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AESTRACT

The monograph has been arranged to offer the reader maximum insight into not only the role of the Vocational Expert, but his role when viewed as one factor interdependent with several others in the total context of the adjudicative process of the Social Security disability program. Emphasis is given to its genesis and evaluation, emphasizing the concept of forensic vocational psychology. The monograph presents a look at the Social Security disability program's history, problems which currently are being confronted, and plans for the future. Articles included cover medical reporting and evaluation, techniques of vocational testimony, and the vocational expert as perceived by the hearing examiner. Appendices contain a summary of the adjucative process, a copy of the medical advisor contract, and information on the recruitment of vocational experts. (Author/SES)

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Forensic Psychology in Disability Adjudication: A Decade of Experience

Vocational Experts in the Bureau of Hearings and Appeals

CG 007 836

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Forensic Psychology in Disability Adjudication: A Decade of Experience

Vocational Experts in the Bureau of Hearings and Appeals

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Preface

Disability insurance benefits are payable under Title II of the Social Security Act, as amended, to individuals who meet the statutory conditions of entitlement. One such condition is the claimant's "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment" which meets the requisite time factors. This has presented unique problems at all adjudicative levels in the Social Security Administration, but particularly to the Bureau of Hearings and Appeals (BHA) which has the responsibility for developing and documenting records in order to make informed decisions, and for meeting the evolving views of the Federal courts when judicial review is sought.

While the initial area for the development of evidence to determine if a claimant may be entitled to disability benefits is medical, once the evidence is sufficient to establish a prima facie case of the claimant's inability to engage in work for which he is demonstrably qualified, the record must be amplified to include evidence as to the claimant's ability to transfer proven skills—and utilize material aptitudes—to perform other work in such manner as would establish his ability to engage in other types of work which would constitute "substantial gainful activity."

The Bureau of Hearings and Appeals has been faced with an unprecedented problem of developing techniques for identifying sources of such vocational evidence and including it in the hearing record. Obviously, the key to any solution was locating qualified individuals who could testify as expert witnesses concerning the claimant's apparent capacity or incapacity to utilize his skills and aptitudes in another type of work predicated on the relevant evidence in the record, medical and nonmedical, fixed or variable. Through the cooperation of the American Psychological Association and the American Personnel and Guidance Association such individuals were located and placed under contract to testify as impartial expert witnesses where the record reflected the need for such opinion evidence.

The second aspect of the problem was in securing judicial acceptance of such evidence, which was without significant judicial precedent, although similar use of opinion evidence in other analogous fields is well established. After 10 years of experience, it is appropriate to evaluate the use of vocational testimony by this Bureau and of the reaction of the judiciary to such utilization.

The evaluation is for the benefit of those persons who are involved in the program. Nonetheless, candor suggests the desirabil-

ity of noting that the various articles represent the views of the authors and are not necessarily the policies of this Bureau. Especially is this true since what is said today may be modified tomorrow as the program continues to evolve.

H. Dale Cook
Director
Bureau of Hearings and Appeals

Introduction

This monograph has been prepared in response to the requests we have received for information about our program and how we view its past, present and future in relation to the claimants, the public, and the professions we serve.

The monograph has been arranged to offer the reader maximum insight into not only the role of the Vocational Expert, but his role as viewed as one factor interdependent with several others in the total context of the adjudicative process of the Social Security disability program. Emphasis is given to its genesis and evaluation, emphasizing the concept of forensic vocational psychology.

We believe this information will provide potential Vocational Experts, new Hearing Examiners, and others already familiar with the program, helpful insight into the problems we have faced, are facing, and how we plan to resolve them.

Because the past is often prologue, we present a glimpse of the Social Security disability program's history; because the present is "where it's at", we include some of the problems with which we are currently confronted; because the future depends significantly upon our preparations, we discuss some of our plans.

This seems to me to be the appropriate place at which to acknowledge the contributions of the authors of the various articles and of others whose advice and efforts were necessary to bring this work into being.

The preparation of the monograph was under the guidance of a committee composed of Robert B. Hannings as Chairman, Dr. Daniel Sinick and Dr. Philip Ash. Mr. Hannings was Assistant Bureau Director at the inception of the program and was particularly well-qualified to oversee the preparation of the material. Daniel Sinick and Philip Ash are two of our most experienced and informed Vocational Experts.

The motivation and drive to undertake and complete the compilation was furnished by Mr. Louis Zinn, Vocational Consultant Program Administrator. In addition to preparing the material on our judicial experience, Mr. Alvin Orlowek, Chief, Case Analysis and Assignment Section, Civil Actions Branch, Division of Program Operations, furnished invaluable advice and assistance.

My assignment to coordinate the activities of the Division of Program Operations and the committee was made simple by the unstinting efforts of those named above to whom, on behalf of the Bureau, our thanks is extended.

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Chapter I

Background and Role of the Vocational Expert in the Social Security Disability Program

Louis Zinn

In retrospect, the Social Security disability program represents a microcosm of the interaction and reaction among the three branches of government—legislative, executive and judicial. It is a typical example of the attempt by an administrative agency to implement Congressional will and intent, only to be frustrated by the judiciary; then turning to the Congress for assistance in overcoming these frustrations.

Beginning in 1945, several attempts were made to establish a disability program under Title II of the Social Security Act. Congress rejected these attempts, basically, because it feared that the Trust Fund would meet the same fate that befell insurance companies during the depression of the 1930's, when claims for disability (many bordering on the fraudulent) reached such proportions as to jeopardize the financial structure of many of these companies. A compromise was reached in 1954. The initial legislation took the form of a "disability freeze" with no cash benefits payable. An individual who was disabled would have his wage record "frozen" at the "point of disability". This would have the effect of increasing (or at least not decreasing) the amount of retirement or survivor's benefits which might later be forthcoming. Secondly, Congress made it clear (at least to the Social Security Administration) in its deliberative reports, that it wanted a "conservative program", by requiring that entitlement be established only by a showing of a "severe" impairment which prevented one from engaging not only in his prior or customary work, but *any* type of substantial gainful activity. Moreover, to allay fears that claims would be paid on mere allegations of pain and other subjective symptoms, the law required that the impairment be "medically determinable."

The Social Security Administration attempted to carry out Congressional intent, both in its adjudicative policies and in writing the Regulations relevant to the disability program. The courts were in many instances reluctant to accept this approach, manifesting their reluctance by declaring the Regulations invalid on the ground they were more restrictive than the statute, or by pointing to the traditional judicial position that remedial legislation, such as the Social Security Act, should be liberally construed.

In 1956, Social Security amendatory legislation provided

monthly disability insurance benefits for eligible disabled individuals, age 50 to 64, inclusive. It also provided monthly benefits effective January 1957 for disabled children, age 18 or over, of retired or deceased individuals, provided the child's disability began before age 18.

The 1958 amendments provided for the payment of benefits to qualified dependents (including disabled children age 18 and over) of individuals receiving disability insurance benefits. In 1960, the age 50 limitation for receipt of cash benefits was eliminated.

Despite the inroads made by the judiciary, Congress, in tacit approval of the manner in which the program was being administered, took no action to alter the basic definition of disability until the 1965 amendments. At that time the statute was amended by liberalizing the technical requirements for the disability freeze and for disability insurance benefits. Also, the requirement that a person's impairment must be expected to be of long continued and indefinite duration was eliminated. In lieu thereof, the legislation provided that an insured individual would be eligible for a disability freeze and benefits if he was unable to engage in substantial gainful activity by reason of an impairment which has lasted or can be expected to last for a continuous period of at least 12 months or result in death.

Under the statute, initial and reconsidered determinations are made by State Agencies (known as Disability Determination Units) in each of the 50 states, District of Columbia and Puerto Rico. These determinations are reviewed by the Bureau of Disability Insurance, SSA (the administrative agency in Baltimore) where they are approved or rejected. This procedure applies to the two prehearing adjudicative levels. If, after the reconsideration determination, the claimant is still dissatisfied with the determination, he may request a hearing before a Hearing Examiner of the Bureau of Hearings and Appeals, Social Security Administration. The hearing is held at a place convenient to all persons involved and a verbatim hearing record is established. The Hearing Examiner in his decision may either affirm or reverse the prior administrative decision in whole or in part. The Appeals Council of the Bureau of Hearings and Appeals, Social Security Administration, may review the decision of the Hearing Examiner at the request of the claimant or on its own motion and issue a decision affirming or reversing the Hearing Examiner. If still dissatisfied, the claimant may obtain a judicial review of the final decision by the U. S. District Court, U. S. Circuit Court of Appeals, and perhaps the U. S. Supreme Court.

Statistically, approximately 70% of all claims are allowed at the first two administrative levels. The vast majority of these cases

are so-called medical allowances. That is, the medical evidence describes impairments of such severity as to be presumed sufficient to render impossible any and all significant vocational endeavor. In a much smaller number of claims, benefits are paid, although the impairment is of a lesser severity than that described above, if the individuals are of advanced age (late fifties or beyond); have little or no formal education; and a vocational background that has been confined to arduous unskilled jobs.

On the other side of the coin, the majority of denied claims are of two types. One is where the objective medical evidence fails to establish a credible medical basis to explain subjective complaints. The second type of denial are those where the described impairments preclude the individual from performing his former or usual work, but are not so severe as to preclude all vocational activity. At this point, consideration is given to non-medical factors—age, education, and work experience. If in light of these factors, it is believed that the claimant has the qualifications to perform other types of work, the claim is denied. This is in order to carry out the mandate of Congress that disability benefits are not payable solely on the basis of occupational disability. The Congress had considered the possibility of an occupational disability test similar to that of various State Workmen's Compensation laws, the Civil Service Commission test, and private insurance companies, but in the final analysis, rejected this for a total and permanent disability test. An administrative agency must administer the law enacted by the Congress even though certain social objectives may not be met, or some possible inequities may result.

Within this background of the disability program, we can turn our attention to the roles of the Hearing Examiners and Vocational Experts in the overall administration of the disability provisions of the Social Security Act.

The term "Hearing Examiner" defines the nature of his duties. His time is spent in conducting hearings and writing decisions thereon. It is the Hearing Examiner's duty, as trier of the facts, to consider the evidence and to render a decision on the basis of the entire record, including the evidence initially adduced at the hearing. His position is quasi-judicial in nature. He has a duty to reach his own conclusions on the facts and law in accordance with the statute, regulations and appropriate precedents. He has a dual responsibility in that he must safeguard the claimant's interest to the full extent of his rights and also safeguard the Government's interests. Of equal importance is his duty to insure that benefits are paid to those who meet the requirements set out in the law and to insure that Government funds are not paid out to those who fail to meet such requirements.

Under the law, benefits are denied to those individuals who establish as of the appropriate time that they suffer from impairments which prevent them from engaging in their former work, but who still retain the physical and mental capacity to perform other significant occupations. For the first few years of this program, this type of case was denied on assumptions based on "common knowledge" insofar as vocational factors were concerned. There was little concrete evidence, medical or otherwise, to show whether the claimant did, in fact, have occupational skills which could be transferred to work less physically demanding than that which he formerly performed.

In November 1960 a decision was rendered by the U. S. Court of Appeals for the Second Circuit in *Kerner v. Flemming* (283 F. 2d 916) which materially changed both the administrative and judicial approach to these cases. The court held that a denial of disability benefits could not be sustained on the "mere theoretical ability" to engage in substantial gainful activity. Rather, held the court, where a claimant for disability benefits has presented evidence to show that he is precluded from engaging in his usual, prior or customary occupations, there is a burden on the administrative agency to produce evidence showing what other work, if any, he can still do, and what employment opportunities in such work are *available* to him. This case enunciated the requirements that have become known as the "Kerner criteria." The court further made it clear, in the context of the fact situation, that these criteria encompassed more than the claimant's physical or mental capacity to perform a specific job, and included such factors as his age, education, and past vocational experience. The court also commented that "it should not be hard to provide evidence as to what work the plaintiff can and cannot do, and the Secretary's expertise should enable him to readily furnish information as to the employment opportunities or lack of them, for persons of plaintiff's skills and limitations."

The interpretation of the Act set forth in the Kerner decision was accepted by the Social Security Administration. The primary change impelled by the decision was the placing in the record of vocational evidence much of which was commonly known, but the greater part of which was obscure or controversial.

Initially the Social Security Administration attempted to meet these requirements by citing selected government and industrial studies. These studies showed the results of surveys reflecting information that individuals with certain impairments were presently, or had been in the past, engaged in various types of occupations in American industry. This approach, while successful in some cases, was soon rejected by several courts, including several

Courts of Appeals, as being too theoretical in determining whether there were employment opportunities available to disability claimants who were unable to perform their usual jobs. Essentially, the studies were criticized because they were not related to the individual claimant, with his impairments, age, education, and work background. Consequently, it became necessary to seek other methods which would overcome the objections and criticisms levied against this textbook technique. For this reason, it was decided to employ Vocational Experts to testify at administrative hearings, at which time these expert witnesses would address their testimony to the claimant's particular and highly individual situation, in an effort to satisfy the Kerner criteria. The cooperation of the American Psychological Association and the American Personnel and Guidance Association provided access to such persons.

The use of Vocational Experts has been accepted and approved by every Court of Appeals, and by virtually every District Court. However, subsequent decisions refined and expanded the original Kerner criteria to such an extent that certain changes in the qualitative aspects of vocational testimony were required irrespective of the policy position of the Administration.

The first of these decisions was issued in September 1964 by the U. S. Court of Appeals for the Fourth Circuit in the case of *Cyrus v. Celebrezze* (341 F. 2d 192). This decision was important for two reasons. First, the court required that the Department produce evidence to show that the work a claimant could do existed in the community in which he lived. Secondly, the court rejected the vocational testimony because the consultant had relied "exclusively" on the *Dictionary of Occupational Titles* and ancillary texts in testifying on the subject of employment opportunities available to the claimant. The court held that the Department's burden on this issue could be sustained only if the expert conducted an independent investigation of local employers to ascertain whether they would employ individuals with the claimant's impairments and work background. Following the issuance of this decision, and prior to the 1967 Amendments to the Social Security Act, the Courts of Appeals for the Third, Fifth, Sixth and Tenth Circuits issued decisions applying a "local availability of employment" test, as had numerous District Courts.

In October 1966 the Kerner criteria were further refined, this time on the question of what constituted "availability of employment." Prior to this, there had been no judicial decision which defined "availability" in positive terms. It was generally found that the term implied something more than the mere existence of jobs within a claimant's physical capacity, but less than actual job vacancy. The U. S. Circuit Court of Appeals for the Fifth Circuit

in *Gardner v. Smith* (368 F. 2d 481), defined "availability" as the "reasonable opportunity to be hired if the job were open and applications for employment were being taken." The court further amplified its definition by stating: "If a physical or mental impairment prevents one from obtaining a job, or from even being considered for the job, he is just as unable to engage in that activity as he would be were he unable to perform the work after he had obtained the employment." Thus, there was an ever increasing trend on the part of some of the courts to establish an employability test, rather than a disability test.

The foregoing discussion indicates the extent to which the courts imposed a progressively greater evidentiary burden upon the Social Security Administration with regard to the vocational or non-medical aspects of adjudication.

After being made aware of these court decisions, Congress, as of January 2, 1968, clarified "disability" to reaffirm its original intent in regard to severity. The statute now defines "disability" (except for certain cases of blindness) as the inability to engage in *any* substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months. It further provides that an individual shall be determined to be under a disability *only if* his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work, but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. For purposes of the preceding sentence, (with respect to any individual) "work which exists in the national economy" means work which exists in significant numbers either in the region where such individual lives or in several regions of the country.

Today, to establish disability, the claimant must show that he has an impairment or combination of impairments of serious proportions. Although it is not necessary for the claimant to be totally helpless to demonstrate he is disabled, the statute is not satisfied by merely demonstrating that he is no longer able, at the time of alleged disability, to engage in his previous or customary occupation. He is required to clearly establish that his disabling condition has resulted in an inability to engage in any significant gainful activity. Thus, a claimant who was a heavy equipment operator, who loses a limb in an accident, may be disabled in

terms of returning to his previous occupation, but obviously the loss of the limb does not necessarily preclude his working in another position. He must demonstrate that the loss of the limb makes it impossible for him to function in any job whether that job be below or above his previous occupational level. It should be noted that the rehabilitation potential of a claimant is not the issue and is irrelevant to his obtaining or not obtaining disability benefits.

While as a matter of law it might be contended that it is the claimant's responsibility to affirmatively establish by a preponderance of the evidence of record with respect to all factors of entitlement, many of the courts have concluded that, at some point in a case, the burden of proof shifts to the Administration. The extent to which this has become an issue is not too important. Historically, the Social Security Administration aids claimants in developing their claims. Thus, when a disability claim is pending before a Hearing Examiner and he is of the opinion that the testimony of an expert witness is material for amplification or clarification of the record, he not only may, but should, call such a witness. When he does determine that testimony from a Vocational Expert will be necessary, he requests a member of his staff to obtain one for the case under procedures designed to assure impartial selection. The Hearing Examiner has no substantive contact with the vocational witness except in writing, or in open hearing. Any correspondence between the Hearing Examiner and the vocational witness is made a part of the hearing record.

The Vocational Expert is present during the entire hearing so that he will be familiar with all the evidence. He is also given an opportunity to examine any new documentary evidence submitted. Ordinarily, he is the last witness, in order to insure that his testimony is based upon the entire record. The claimant's attorney, and the claimant himself (if not represented by an attorney), may question the Vocational Expert on any pertinent matter.

It is the Vocational Expert's function to testify as to whether or not an individual is, or was at the relevant time, able to engage in specified occupations with only the normal period of training and orientation usually given new employees. The Vocational Expert is neither expected nor authorized to testify (or volunteer an opinion) as to whether the claimant is under a "disability." The Hearing Examiner alone has the responsibility for deciding this ultimate legal issue. Similarly, he is not expected to express an opinion regarding the severity of the claimant's impairments, physical or mental. These are medical matters within the competence of physicians.

His testimony will normally be predicated on assumptions posed

by the Hearing Examiner with respect to the claimant's residual functional capacity. In each instance he will be asked whether there are fields of work and jobs within those fields of work to which the claimant can realistically transfer his skills, as of the pertinent time, considering his demonstrated prior vocational achievement and the residual functional capacity assumed. The testimony should be completely responsive to, but not go beyond, the Hearing Examiner's hypothetical question(s).

In all cases, it is imperative that the Hearing Examiner and the Vocational Expert remain objective. The Hearing Examiner has no interest in the case other than to conduct a fair hearing, obtain a full and adequate record, and thereby make a determination based on fact. The fact the Vocational Expert's fee is paid by the government must not influence the objectivity and impartiality of his opinion.

Two basic vocational issues are contained in the statutory definition noted above. First, what kind of work, if any, (transferability of skills) can this claimant do in light of his prior work activity and residual functional capacities considering his age, education, training, and experience? The second issue concerns the existence of such appropriate jobs, their numbers and general location.

To respond to these two issues requires considerable background analysis and preparation for a specific hearing, particularly for a Vocational Expert who has never testified in a quasi-judicial setting or without the benefit of psychological tests. The Vocational Expert has a dual task: (1) to evaluate and analyze the claimant's capabilities and experience, and (2) to furnish accurate occupational information tailored to fit both the claimant and the labor market in his region, as well as nationally.

It is vital that any jobs suggested as appropriate (transferability of skills) for the claimant be of a realistic nature. They should reflect (1) physical requirements and working conditions which will not aggravate his impairments and (2) occupationally significant characteristics demanded by these suggested jobs which are in consonance with prior work experience and require a minimum of orientation and training. This places the occupational evaluation on a placement level and takes the individual essentially as he is.

In transferring skills, the Vocational Expert must clearly enter into the record how he "bridged the gap." For example, a claimant who worked as a cabinetmaker may not be able to perform his previous duties because they are too strenuous, but can perform light activity. The cabinetmaker job requires the following occupationally significant characteristics: manipulative dexterity, eye-

hand coordination, ability to comprehend and apply mechanical principles. If none of these characteristics has been impaired, he should be able to transfer these work characteristics to light jobs within a field of work related to cabinetmaking or to other fields of work requiring similar occupationally significant characteristics. Specific jobs should be identified.

In the area of transferability of skills, extensive knowledge of and expertise in the use of the 1965 edition of the *Dictionary of Occupational Titles* (DOT) and its supplements are invaluable. The DOT is also of inestimable utility in providing standardized definitions of sedentary, light, medium, heavy and very heavy physical activity which may be incorporated into the vocational expert's testimony.

Concerning the existence and numbers of jobs, the second vocational issue, the Vocational Expert will be asked to provide the numbers and locations of each job mentioned and to indicate the source of his information. It is the Hearing Examiner's responsibility to decide whether this information is sufficient to satisfy the statutory requirements warranting denial of the claim.

The most persuasive testimony concerning the numbers of existing appropriate jobs is based on personal knowledge resulting from contacts with employers and observation of the jobs as they are performed. This type of knowledge should be developed as a part of the expertise brought to the hearing by the Vocational Expert.

Vocational surveys of business and industry conducted by Vocational Experts and those conducted by State Employment Service Agencies are excellent sources of information. They should not be relied upon exclusively or quoted verbatim, since they are a supplement to, rather than a substitute for personal knowledge.

The following pages illustrate the typical data found in reports of vocational surveys conducted by a Vocational Expert and a State Employment Service Agency, respectively. Identifying information has been purposely deleted.

In conclusion, the Vocational Expert provides opinion evidence in an impartial objective manner in order to promote a sound decision by the hearing examiner, whether it is an allowance or a denial.

Vocational Survey Form

Conducted for Bureau of Hearings and Appeals, Social Security Administration by _____

Name of business _____ Nature of business Printing

Address _____

_____ Total employees 690 SIC No. 2571

Person interviewed _____ Date of contract: 7/17/71

Title Assistant to Director of Industrial Relations Method of Contact: Personal

Light or sedentary jobs performed in business:

Job Title	DOT No.	No. Jobs	Job Description	Physical* Demands	Working Cond.	Significant Characteristics	GED	SVP
File Clerk	206.388	9	General filing	L(20%), 3, 4	I	Attention to detail in clerical procedures	3	3
Clerk-Typist	209.388	18	Typing and clerical work	S(80%), 4, 5, 6	I	Finger dexterity, attention to detail	3	3
Office Clerk	209.588	5	General clerical work	L(70%), 4	I	Following rountine clerical procedures	3	2
Copy Holder	209.588	4	Reads copy to proofreader	S(100%), 5, 6 SUL	I	Reading and verbal ability, attention to detail	3	4
Key-Punch	213.582	18	Runs key-punch machine	S(20%), 4, 6	I	Eye-hand coordination, finger dexterity	3	4

*Parenthesis shows estimated percentage of time spent sitting.
SUL—Single upper limb may suffice for performance of job.

Vocational Survey Form

Conducted by: _____

Name of Business: _____ Address: _____ SIC Code 2032

Business Nature: _____ Total Emp: 45

Person(s) Interviewed: _____ Title: _____ Contact Date: _____ Method: Personal Observation

Job Identification	No. of Empl.	Job Description	Physical Demands	Work. Cond.	Occupationally Sign. Char.	GED	SVP
Estab. Title **Glass Inspector** DOT Title **Cannery Worker** (can. & preserv.) DOT Code 529.886	* See below	Inspects glass jars as they pass on a conveyer by watching through a large magnifying glass to detect any defects. Defective jars are removed and belt is stopped.	Sedentary. Sitting — 100%. Constantly seeing without looking elsewhere. Is only req. to do this ½ hr. without relief.	Hot and noisy.	Form perception to detect slight flaws in glass jars.	1	1
Estab. Title **Filling Line Operator** DOT Title **Cannery Worker** (can. & preserv.) DOT Code 529.886	* See below	Tends jar filler to see that same content is in every container as the containers pass on conveyor. If jar breaks, must shut off machine immediately and call Quality Man. If improperly filled, stops machine and removes container.	Sedentary. Sitting — 95%. Lifts up to 2 lb. occasionally. Work speed to keep up with conveyor.	Hot and noisy.	Form perception to detect differences in contents.	1	1

Job Identification	No. of Empl.	Job Description	Physical Demands	Work. Cond.	Occupationally Sign. Char.	GED	SVP
Estab. Title **Filling Machine Tender** DOT Title **Cannery Worker** (can. & preserv.) DOT Code 529.886	* See below	Tends hopper which contains prepared food to see that it does not overflow. Shuts off supply when necessary. Uses large wooden utensil to push away any overflow.	Light. Standing 100%. No lifting.	Hot and noisy.	Manual dexterity. Must give close attention to duties.	1	1
Estab. Title **Weigher** DOT Title **Cannery Worker** (can. & preserv.) DOT Code 529.886	* See below	Weighs cans of various food products to see that proper amount is in each can. Obtains can from conveyor and replaces it there after weighing.	Light. Standing 100%. Lifts 5 lb. max.	Hot and noisy.	Form perception to see that each can weighs the same.	1	1

* These are all line jobs. Employee must be able to perform each task as they rotate every half-hour. Total—45 employees.

Chapter II

Role of the Vocational Witness at the Disability Hearing

Houston T. Eddens

The use of Vocational Experts in hearings for disability benefits under the Social Security Act came about as a result of various court decisions, particularly the decision of the Court of Appeals for the 2nd Circuit in *Kerner v. Flemming*, 283 F. 2d 916 (1960). Prior to the court decision the Hearing Examiner had acted as his own placement expert in concluding what jobs an individual claimant could perform, despite any existing functional impairments. The Hearing Examiner referred to the Dictionary of Occupational Titles, the Worker Trait Requirements for 4,000 jobs, state employment service periodicals, etc., as the source of jobs within the economy for which he found the claimant qualified by age, education and experience.

In the *Kerner* case the court concluded that once the claimant established inability to perform his usual or regular work due to impairment, the burden shifted to the Secretary and it became his responsibility to show what work the claimant could or could not do and what employment opportunities there were for a man who could do only what the claimant could do.

The court required the furnishing through the Secretary's expertise, of information as to employment opportunities or lack of them for persons of the claimant's skills and limitations. Thus, the court rejected the Hearing Examiner as an expert in the field of vocational assessment of a claimant.

To provide the expert evidence required by the courts, the Bureau of Hearings and Appeals turned to the Vocational Expert as the best source of expertise concerning (1) transferable skills which the claimant retains despite physical and/or mental impairments, and (2) the incidence of appropriate jobs in the economy.

The first Vocational Expert witnesses came primarily from the academic field and involved individuals knowledgeable in their field, but with limited personal knowledge of job performance in the various areas of work. Of course, many vocational witnesses brought to the hearing personal experience as the result of actual work with vocational rehabilitation agencies, placement agencies, and consulting work with private industries. But many of them cited the same source material formerly used by the Hearing Examiner, i.e., the Dictionary of Occupational Titles, the Worker Requirements for 4000 Jobs, state employment reports, etc. In

many instances their testimony appeared from the record to have originated solely from published vocational material and to have been based on no personal knowledge of the jobs which they had described in their testimony. In addition, lack of personal knowledge of actual job requirements by the expert witness often caused him to be unable to support his direct testimony on cross-examination. As experience was gained at the disability hearings, the Vocational Experts acquired personal experience in the various job fields through job surveys, personal interviews, and first hand experience in work fields involved.

The use of expert vocational testimony seemed to be the answer to the mandate of the courts, but as time went on various of the courts required more detailed vocational evidence and required the consideration of employability and job placeability in the claimant's immediate geographical area. This was contra to the position of the Social Security Administration that the definition of disability was to be applied with uniformity and consistency throughout the nation, and without regard to where a particular individual might reside, and without regard to local hiring practices or employer preferences or to the state of the local or national economy. This situation was clarified by the 1967 Amendments to the Social Security Act. In commenting on the 1967 Amendments to the Social Security Act, the Committee on Ways and Means, on H.R. 12080, House Report No. 544, 90th Congress, 1st Session, August 7, 1967, at pp 28–31, noted:

> ". . . It is, and has been the intent of the statute to provide a definition of disability which can be applied with uniformity and consistency throughout the nation, without regard to where a particular individual may reside, to local hiring practices or employer preferences, or to the state of the local or national economy. . . ."

The Social Security Act as amended in 1967 provides in Section 223 (d) (2):

> ". . . an individual . . . shall be determined to be under disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work, but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. . . ."

In deciding a claimant's right to receive disability insurance benefits, the Hearing Examiner's decision is not so much a medical

determination as it is a determination of residual functional capacity. The Act does not authorize payment of benefits merely because of the existence of a disease process or an injury. Instead, a disease process or injury is compensable under the Act only when it interferes with an individual's functional capacity to such degree that it prevents him from performing work for which he is otherwise qualified by age, education and work experience.

It is the Hearing Examiner's function alone to determine the degree and amount of functional capacity remaining despite disease or injury. The Hearing Examiner does not require the assistance of a Vocational Expert in this determination. This determination results from the Hearing Examiner's evaluation of the medical and other evidence of record bearing on the degree of permanent impairment and retained functional capacity.

The Hearing Examiner does require information from the Vocational Expert in relating the use of retained functional capacity to a work situation. Thus, if the Hearing Examiner in his pre-hearing inspection of the case identifies no physical or mental reason that would prevent the claimant from performing his regular or usual work, he would not require expert advice regarding transferability of skills to other areas of work. On the other hand, if pre-hearing inspection suggests a likelihood the claimant may experience impairments which would or could prevent return to his former work, then obviously, expert vocational assistance is indicated. It is at this point a Vocational Expert is selected to appear and testify at the hearing in order that in reaching his decision in the case the Hearing Examiner may have at hand all necessary information for a fair decision to the claimant.

The vocational witness, like the Hearing Examiner, does not see the claimant prior to his appearance at the hearing. He has had no opportunity to interview or to test him. How then does he go about preparing himself to testify at the hearing, and what sort of testimony is expected of him at the hearing?

The Hearing Examiner expects to receive impartial expert testimony that is meaningful and useful in his deliberations of the case. He expects the vocational witness to appear at the hearing prepared to testify with preciseness as to the existence or non-existence of jobs in the economy for which the claimant is qualified by age, education, and work experience. He expects the expert to be fully informed concerning jobs and prepared to testify as to the normal physical requirements, work conditions, and occupationally significant characteristics of jobs held by the claimant prior to suffering his impairment. At the hearing, in response to hypothetical questions, the vocational witness must be prepared to express his opinion as to whether there are fields of work and jobs

within the field of work to which the claimant could realistically transfer his skills as of the pertinent time, considering his demonstrated prior vocational achievement and his residual physical capacity, and, as pertinent, specify the fields of work and the jobs therein which he believes the claimant can do. He must be prepared to give in detail the reasoning by which he reached his opinion and the facts upon which it is premised. He must be prepared to testify as to whether the jobs which he believes the claimant can do exist in the region where the claimant lives or in the several regions in the economy, i.e., in the national economy.

At the hearing the vocational witness' testimony should be responsive to the hypothetical questions put to him by the Hearing Examiner. He is required to accept functional limitations specified by the hearing examiner. The witness then must relate the defined functional limitations to specific jobs in the economy for which he finds the claimant qualified, if any, and which the claimant could be expected to perform despite the functional limitations specified by the Hearing Examiner.

Thus, clearly, the Vocational Expert, as a professional expert witness, provides a vital service in cases arising under Sections 216(i) and 223 of the Social Security Act. To fully perform this function he must prepare himself prior to the hearing and he must testify in clear and meaningful fashion at the hearing in response to questions posed by the Hearing Examiner, and on cross-examination to questions put to him by claimant's attorney.

To prepare himself to testify at the hearing, the vocational witness must, of course, carefully consider the information provided him by the Hearing Examiner prior to the hearing. He should consider various jobs that would likely fit the claimant under the facts and circumstances, and in doing this he should avoid consideration of "odd ball" jobs, and jobs that are disappearing from the economy. It is not at all impressive to hear that a claimant can be an "ampoule inspector" or a "rag sorter." The courts, as well as the Hearing Examiners, take a dim view of this sort of expert testimony. Reference to these types of jobs is unnecessary in the light of the thousands of jobs in the economy. It is disconcerting to hear that the claimant can be an "elevator operator". The job exists, but it is a job that is being superseded by automation. It is apparent to all that although this sort of job may exist, it does not exist in meaningful numbers and can accommodate only a very limited number of workers in a region. Therefore, the vocational witness should be prepared to refer to jobs that exist in meaningful numbers and he should refer to jobs that are well established throughout the economy.

After the vocational witness has prepared a tentative list of

jobs for which the claimant would seem qualified, he should further prepare himself by job surveys, actual inspection of work performance by workers performing the jobs, reference to state employment service interviews, etc. This will enable him to testify with impressive accuracy as to the physical and mental requirements of the particular job and to convincingly tie job requirements to any functional restrictions suggested by the Hearing Examiner or the claimant's attorney in hypothetical questions. The vocational witness may and should refer to the Dictionary of Occupational Titles, and to other published vocational data in his preparation on transferability of skills. However, it is his first-hand knowledge gained from experience and observation of job performance that is impressive in the record for documenting incidence of jobs in the economy.

Most important is the vocational witness' ability to reply to questions put to him on cross-examination by the claimant's attorney. The Social Security hearing is not an adversary hearing. However, to the claimant's attorney it is adversary, and it is his function to clarify and make inapplicable any testimony by the vocational witness, or other witness, that his client can perform work because his impairments are not of the requisite degree of severity.

The Hearing Examiner expects the vocational witness to be able to testify directly and convincingly on cross-examination. Many vocational witnesses are unable to do so, however. They are vulnerable because, for one thing, they have never been subjected to questioning of their professional opinion. In addition, the witness may not be well prepared and the attorney's questions may cause him to admit a job he testified the claimant could do cannot be done by the claimant because the attorney states the claimant has tried such work and cannot do it because it required physical activity not considered by the vocational witness in his testimony. The vocational witness then may become confused and uncertain of himself and fail to support his earlier testimony.

The vocational witness' response to questions by an attorney requires no more than the ability to think and to explain why he concluded thus and so concerning a job he had stated the claimant could perform. Here the vocational witness' personal knowledge of jobs and his resultant ability to say "I have seen this job performed", "I saw the workers stand, sit, move their hands and arms. I saw them move about and I know the thing they do is sedentary, or I know it is light", leaves his testimony unrefuted. He is the expert. He knows what he has said is the situation and all the attorney can do cannot make him change his testimony or give a confused reply because he has "told it like it is."

Thus, it is essential the vocational witness be fully prepared in order to withstand cross examination. If his testimony does not stand this test, it is of little value because it quickly becomes apparent that it is not expert opinion and, therefore, of little or no real probative value in determining the claimant's ability to work in areas different from his usual work. On cross-examination the Hearing Examiner should not attempt to protect the vocational witness. If the question is relevant an expert witness should need no protection in standing the test of question of the validity of his testimony.

On cross-examination the vocational witness may be asked hypothetical questions by the attorney which involve different considerations than those posed by the Hearing Examiner. This is proper and the vocational witness should respond fully thereto. If, however, the attorney attempts to solicit the vocational witness' opinion of the medical evidence and the degree and extent of impairment, the witness should decline to answer, since such is outside his area of expertise at the disability hearing. The Hearing Examiner, in this situation, would undoubtedly require the attorney to confine his questioning to the witness' direct testimony and to hypothetical questions he might wish to put to the witness.

The vocational witness brings to the hearing a great deal of experience and understanding about the whole man, educationally, psychologically and socially. Yet at the hearing the vocational witness is unable to look at the whole man within his full field of expertise. This has caused some vocational witnesses in testifying at disability hearings to wonder "Have I done what I professionally should do?"

The requirements of the Act and the legal problems involved in disability hearings deny the vocational witness any expression of opinion as to his evaluation of the evidence with regard to the degree of impairment of the claimant. This is solely the hearing examiner's function. This fact in no way detracts from the vocational witness' professionalism.

Of course, it is not at all unusual that an expert witness testify in a case where only a relatively narrow aspect of his expertise is needed. The vocational witness is not asked to give a vocational evaluation of the whole claimant. It is the function of the Hearing Examiner to extract from the vocational witness that part of his expertise that applies to the situation. The witness' replies to the hearing examiner's questions on the vocational factors are usually decisive if they are responsive to the hypothetical question the Hearing Examiner has put to him.

The Social Security disability hearing is for the purpose of permitting the claimant to present his case to the Hearing Exam-

iner who will decide his right to receive benefits, and to permit the Hearing Examiner to make a full and complete record concerning all the issues involved. The participation of the Vocational Expert in the hearing provides critical evidence for evaluation by the Hearing Examiner in deciding the issues.

The vocational witness testifies at the hearing not to permit denial of the claim, but instead to complete the record and to enable the Hearing Examiner to arrive at a fully informed decision in the case; to enable the Hearing Examiner to understand and explain in his decision why the combination of medical and vocational factors justify payment of the claim, or, in the case of denial of the claim, to explain why, despite impairment, the individual can use retained functional capacity in a meaningful work situation.

The Vocational Expert should know that through his expertise there has been incorporated into the record information which permits the claimant to receive full consideration of his claim, and, thus, that he has made a signal contribution to the administration of the disability provisions of the Social Security Act by his appearance and testimony at the hearing.

Chapter III

Medical Reporting and Evaluation

The following articles by two physicians performing different roles in the interrelated medical area are included to illustrate the need for proper reporting and interpretation of medical evidence in terms of functional residual terminology.

Dr. Branscomb writes from the point of view of the Medical Consultant who examines the claimant at Government expense at all levels of adjudication. Dr. Oates writes from the point of view of the Medical Advisor who is available to testify before the Hearing Examiner to interpret and evaluate the evidence of record, including the noting of deficiencies and to translate the medical evidence of record into functional residual capacities. These concepts reflect the necessity for the Vocational Expert to be prepared to testify on varying medical assumptions by the Hearing Examiner, where the medical evidence necessitates such variation.

The Role of Medical Consultant

Ben V. Branscomb

Why a Consultation is Sought

In the course of evaluating a client's request for disability benefits, the services of the Medical Consultant [1] are often sought for several reasons. Often the medical information supplied by the patient and his personal physician is incomplete, with poor documentation of actual symptoms, objective findings, or laboratory results. On many occasions the client's personal physician will simply state that his patient is "disabled"—a determination which can be arrived at only by the Social Security Administration, which uses in addition to the medical findings, other consultations and considerations. On some occasions the consultative examination may be eliminated by specific inquiry back to the patient's personal physician requesting the needed documentation of the diagnosis, description of therapy and its response, or the mechanisms and extent of functional limitations imposed by disease. On

[1] This article is addressed to the use of a medical consultant at the administrative adjudicative levels. However, not only may a hearing examiner or the Appeals Council request a consultative examination, but if a quasi-judicial hearing is held any relevant material evidence obtained by the Social Security Administration at whatever level is made a part of the hearing record after the claimant has had an opportunity to see it and raise any objections to it that he deems appropriate.

other occasions the consultative opinion is sought because the possibly disabling conditions lie outside the area of principal expertise of the client's physician, because the consultant has the facilities and experience required to provide objective information and tests, or because he represents a hopefully impartial individual not subject to emotional bias to which the client's personal doctor is vulnerable. Of course, bias is more often unconscious than conscious and may be for or against a disability decision.

The Consultant's role is similar to that with which he is familiar in regular medical practice in most respects. He must identify the principal medical problems, the extent and adequacy of treatment which has been tried, must give attention to the therapy which seems indicated, and must estimate the nature of the patient's limitations and his prognosis. The examination differs as follows: His principal responsibility is not toward the ultimate therapy of the patient, but to advise the Agency which solicits his opinion for the specific purpose of a disability determination. The Consultant need not work out details of a treatment plan for the patient, but must indicate the major lines of therapy which might help, and must estimate the probable outcome with therapy, assuming the type and extent of subsequent medical management available to the patient. The Consultant must report in precise and well documented detail, often supported by physiological tests, the functional limitations imposed upon the patient, these factors being more important than the etiology. He must report his findings in language readily understandable by non-medical personnel and must, in rare instances, be available for verbal testimony.

Information Needed by the Consultant

To carry out his examination and issue a report which deals effectively with disability problems, the Consultant should receive from the Agency questions, as specific as possible, concerning the problems to be resolved. For example, a useful report will probably follow a question such as, "Does this client have heart failure, and if so, has it been adequately treated? If heart failure is present, assuming treatment to which this client has reasonable access, to what extent should it interfere with physical activity?" A less useful reply may result from the request, "Please carry out a medical examination with special attention to the heart." The Consultant should be provided with any available previous medical records including X-rays and laboratory reports—information he would insist on were he rendering a consultation in a conventional medical setting. The Consultant also should understand the deci-

sion-making process of the Agency in order to anticipate problems which will follow his report. Such information can be obtained from the State agency and from publications similar to this volume. A visit to the State agency for discussion of the process of disability determination with the Vocational Counselor will immediately reveal the dependence of the Agency on precise descriptions reinforced by objective observations and measurements. When in the course of his examination the Medical Consultant discovers he needs to carry out tests not listed in his authorization, he should immediately call the Counselor, with whom he should work as a professional colleague, and explain the need for such studies. Authorization is almost invariably forthcoming in this situation. During his examination the Consultant will occasionally find conditions—perhaps unappreciated by the patient or his own doctor—for which treatment is important. Both the Bureau and the patient should authorize the Consultant to release this information promptly to the client's personal physician.

The Agency should inform the Consultant of any other consultative examinations which are being requested, in order that he may know the extent to which he should direct his attention to problems which may be outside his area of principal interest.

The Examination

The Consultant must carry out exactly the examination or tests (or both) which have been requested by the Agency. If the requests seem inappropriate, incomplete, or if he believes there is a better way to resolve the problems, he should telephone the Vocational Counselor while the client is still in his office. It is time consuming, tedious, and sometimes expensive to return the patient for different procedures which could have been anticipated by the Consultant at the time of the first visit. If added cost to the Agency is required for necessary procedures these must be cleared with the Agency before billing can be submitted.

The Consultant performs a careful history, physical examination, and any laboratory procedures authorized. He gives special attention to details of the history which relate to the nature and extent of symptoms and the exact way these interfere with the client's ability to be active or to function effectively. Often the consultation is authorized in relation to a specific organ system or problem in the Consultant's area of specialization. However, just as in a conventional medical consultation, the history and physical examination must include the review of other organ systems and physical findings to elucidate other possible diagnoses in order to relate the principal impairments to other diseases and organ systems. Diseases which may seem unrelated must be identified

and studied sufficiently to clarify their participation in the client's overall limitations and their relevance to the main problems.

Disability clients usually have anxiety, concern, and sometimes preconceived ideas concerning not only their medical problems, but also the process of disability determination itself. This calls for a great deal of understanding and patience by the Consultant. Although most persons are more concerned with health than compensation, subconscious exaggeration and conscious malingering are occasionally encountered. With repeated non-leading, and indirect questioning, the validity of subjective complaints can usually be reliably estimated. The physician should be present or use appropriate safeguards during tests in which subconscious or conscious malingering are possible. Often a particular function can be tested by more than one means, and the confirmation of repeated or different tests, lends validity to the result. The fact that subconscious or conscious malingering does occur does not reduce, but rather increases the responsibility of the Consultant objectively to document and precisely to describe the extent of functional impairments actually present since the client may nevertheless be totally disabled. It may be desirable to remind the client that disability is established by the Agency, not the physician.

The Report

The report of the consultative examination must be more complete than the conventional medical consultation. Whereas a physician asking another one for an examination may assume the pertinent questions were asked and relevant structures examined, or may know by his own examinations a great deal about his patient's condition, the Agency needs documentations sufficiently complete so that the conclusions of the Consultant can be reasonably drawn from the information actually submitted in the report. Furthermore, the client has legal access to the report should he wish to appeal an unfavorable decision. The Agency (or the client's attorney) renders the client an important service when the reasonable basis for being turned down can be clearly pointed out. Throughout his report the Consultant should relate each complaint or finding to the patient's ability to function in an employee or physically active setting. He should comment on the frequency and magnitude of symptoms, the way they interfere with the patient's activities and the recommendations he would make, as a physician and Consultant, to further activity or employment of the patient. He may wish to comment upon the probable attitude of future employers, or the educational equipment of the client, but the vocational considerations including the existence of jobs are the spe-

cific responsibility of the Vocational Counselor and his consultants in other disciplines. Descriptions of limitations on physical activity by analogy are very helpful to the Counselor, for example, "Although this patient's arthritis of the hands renders him unable to carry out fine finger motions such as might be required by typing or sewing, he should have no problem with more gross activity such as driving an automobile or operating a machine the controls of which require no more fine motion than driving."

Special attention to the periodicity of disease is appropriate: "Although the asthma can be expected to be under reasonably good control most of the time, and pulmonary function tests and the physical examination indicate he will usually be able to carry out heavy physical activity, such as manual construction labor, he can be expected to have further attacks. Absenteeism of one or two days from work every two or three weeks can be reasonably anticipated." Factors interfering with future employment other than purely functional or exercise limitations should be mentioned. For example, a patient with chronic lung disease whose exercise capacity remains good may have large volumes of purulent sputum. The Vocational Counselor must consider whether for this particular client a job is available at which the coughing up of objectionable appearing sputum will be acceptable. Major cosmetic defects also fall into this category.

The Consultant should comment specifically on the degree of cooperation obtained, the apparent consistency and probable validity of subjective complaints, and should make clear those observations and tests which are truly objective ones. For example, the electrocardiographic tracing itself is purely objective, but whether the patient did indeed carry out exercise sufficiently heavy to produce a valid exercise cardiogram may be open to question. The report should be given in medical terms sufficient for clarity to other physicians including other medical consultants of the Agency, the client's own physician, and those who may examine the report in the review process. In addition, all medical language other than rather straightforward expressions should be amplified and clarified in lay terms.

The implication and interpretation of laboratory findings is also provided by the Consultant whether these tests were obtained as the only requested service or were part of a more complete examination. Normal values should always be given for comparison and the extent and significance of any deviation from normal explained. Diagnoses and functional impairments should be related to existing classifications where these are available, such as the American Heart Association Classification for Heart Disease and the medically recognized standards used for tuberculosis, occupa-

tional pneumoconiosis, and others. Use of these classifications however does not obviate the necessity for describing the client's functional limitations in terms of conventional daily activities and easily understandable job requirements.

The future medical needs of the client, the types of treatment or prostheses which may be needed, and his anticipated probable outcome should be included. The Consultant should indicate his own level of expertise or confidence in his findings when dealing with questions outside his area of special interest and may sometimes recommend another consultant for such problems. He should not do so, however, unless he feels the problem may be both relevant to the client's disability status and that his own findings may represent an insufficient examination. When the findings of other physicians seem to be in disagreement, he can be of great service by explaining why he believes the disparity of opinion occurred and by providing his own interpretation of the findings.

Role of the Medical Advisor in Social Security Disability Hearings

J. R. Oates

Medical Advisors serve, not as salaried employees, but rather, under annually-renewed fee-for-service contracts, with the Bureau of Hearings and Appeals of the Social Security Administration of the Department of Health, Education, and Welfare. Their selection, recruitment, and recommendation for appointment is a major responsibility of the Chief Medical Advisor of the Bureau. They represent, in aggregate, all areas of medical and surgical specialization; and each is chosen, *a priori*, on the basis of his relative eminence—whether because of education and training, or clinical or pedagogical experience, or research contributions—in his particular field.

Each claimant for Social Security benefits on the basis of disability originally initiates his claim at his local SSA office, but the initial "determination as to whether the applicant is disabled as defined by the law is made by a State agency working in cooperation with the Social Security Administration." Unexceptionally, "a physician in the State agency participates in making each disability determination." And then, "to assure national consistency, State determinations are reviewed at the headquarters of the Bureau of Disability Insurance, Social Security Administration."

This Bureau then will notify the applicant of the decision in his case and will inform him of his right to appeal their decision, should he disagree with it. Any such "appeal" will be in the form of a request that the claim be reconsidered. Should it again be disallowed, the claimant "can have it ruled on by a Hearing Examiner (of the Bureau of Hearings and Appeals) of the Social Security Administration."

Once the "case" has been assigned to him a Hearing Examiner will schedule a hearing at which the applicant for disability benefits will be given every possible opportunity to present his claim. At this juncture the Hearing Examiner must decide, after reviewing the available medical information, whether he will require the assistance of a Medical Advisor and/or a Vocational Expert at the forth-coming hearing. If so, he will select a Medical Advisor from the locality at which or district within which the hearing will be conducted. Of course, the chief factor in the selection of the Medical Advisor will be his expertise in those impairments which the claimant asseverates to be disabling in his particular case.

"Under social security, disability means: 'Inability to engage in *any* substantial gainful activity by reason of any medically deter-

minable physical or mental impairment . . .' " This is the *raison d'etre* of the Medical Advisor, and it defines, inferentially, his tasks: (1) he must determine, in the most objective manner possible, from available medical records, presence or absence of "any . . . physical or mental impairment . . ."; and (2) he then must delineate precisely the functional limitations imposed by such impairment.

The Medical Advisor is furnished, prior to the hearing, all available medical records concerning the claimant. He must thoroughly review these before the hearing, his first objective being the gleaning from them of significant facts which tend to prove (or disprove) the presence of any impairment. Simple though this may sound, it is a task which often requires a peculiar skill in winnowing wheat from chaff—and it is no exaggeration to assert that the worth of a Medical Advisor will be, from the outset, directly proportional to his skill here.

Sometimes credible as well as helpful medical records are difficult to come by. They may have been lost or mislaid,certainly; but this rarely occurs. Instead, a common problem is that firm diagnoses often are not to be found and, even more often, objective bases for diagnoses are not discernible. Despite such inadequacies, a skilled Medical Advisor not infrequently can piece together factual shards and glimmerings and ultimately construct a foundation of sound diagnostic impressions upon which can be erected an edifice of objectively demonstrable impairments.

Another major and vexing "medical records problem" is that of reconciliation of seeming inconsistencies. Physicians do not always concur in their medical opinions. So a given claimant's medical records may contain two or more conflicting diagnoses. Here a Medical Advisor's sagacity and acumen may be tested to the utmost. Sometimes he may be able to reconcile seeming irreconcilables. When this is possible, an invaluable contribution is made. When it is not possible, the Advisor must be able, at the least, to suggest means of resolving the dilemma.

A third problem is that seemingly adequate medical records sometimes will lack a few critical bits of information. For example, from the hospitalization of a claimant who underwent low-back disc removal there may be the final diagnoses, history and physical examination, and x-ray reports, but no report of surgery. All medical records furnished the Hearing Examiner will have come to him from the State agency, and that agency may have failed to perceive important hiati. Surely this should not happen, especially by the time a claimant's appeal has reached the Hearing Examiner level, but it does. How can this be corrected? Perhaps it would be better to err on the side of "too much", rather than "too

little," and insist that *all* a claimant's medical records be obtained by the State agency and furnished the Hearing Examiner.

But what if, after all, the medical records are hopelessly inadequate? Then there is no alternative simply to so notifying the Hearing Examiner. Appropriate steps to be taken thereafter will be his to determine. Most fortunately, the knowledge and experience of most Hearing Examiners (and their hearing assistants) is such that situations like this rarely arise: they detect the inadequacies before the point of selection of the Medical Advisor for a particular hearing ever is reached.

Once at the hearing, the Medical Advisor lucidly must be able to present his conclusions so that they support his first decision, whether or not proven impairment exists. Granted, the apostle was correct when he observed that different gifts are given to different individuals: not all physicians can be expected to possess equal expository gifts. But all Medical Advisors *should*, at a minimum, be able to express themselves logically and understandably. The preceding calls to mind an especially pernicious problem, that of medical argot. There is no place for it at hearings, because it is essential that all present clearly comprehend the Medical Advisor's opinions. To state this another way, of what use is a Medical Advisor who obfuscates his testimony by employing unintelligible technical terms?

The Medical Advisor's testimony at a hearing inevitably must conclude with his transliteration of any medically determined impairment into functional terminology, *i.e.*, with his explanation of how a claimant's impairments limit his functional ability. Medical terminology must be anathema here: this exposition will be the very foundation of the forthcoming testimony of the non-medical Vocational Expert; and he and the Medical Advisor must "speak the same language." Neither must any detail be spared. The Medical Advisor must state in the most precise manner possible the claimant's limitations in two areas, ordinary activities of daily living (e.g., eating, walking, dressing, and the like) and occupational activities.

The last will, understandably, have to be related, in particular, to the claimant's occupational skills and previous occupations; so the Advisor must have a fairly detailed knowledge of the tasks involved in many individual occupations. Additionally, the claimant's testimony at the commencement of a hearing should be directed toward revelation of his background of education and training, of his past work background, and, especially, of the skills and tasks required for jobs he previously has held. This information usually will be quite helpful to the Vocational Expert and Medical Advisor alike. Perhaps an example would be appropriate here. Let

us assume that the claimant has a medically demonstrable lumbar intervertebral discopathy with associated radiculopathy (i.e., a "ruptured disc" in the lower back which is causing nerve root compression) and has always worked as a carpenter. The Medical Advisor must assess the "severity" of his condition and then must explain how his physical impairments affect his ability to return to work as a carpenter. He must estimate any limitations in prolonged standing or walking—carpenters do a great deal of both. He must estimate limitations in repetitive bending (e.g., in using a hand saw or hammer), in bending and lifting (e.g., in picking up nails and boards), and in bending and "twisting." He also must take into consideration possible limitations in climbing and in ambulating over rough and uneven surfaces; and he must consider, too, any limitations in bending combined with pushing (e.g., putting boards into a vertical position) or pulling (e.g., using a claw hammer to pull nails.)

With precise, detailed information such as the preceding, expressed in commonly understood language, the Vocational Expert will be able to decide whether any job for which the claimant is suited (by reason of his training and experience, and despite his physical limitations) exists in the national economy in significant numbers. Under some circumstances, too, it may appear desirable, either to the Vocational Expert or the Hearing Examiner, to have the Medical Advisor remain to hear the Vocational Expert's testimony, thereafter to make any expository or summational comments which may yet appear necessary.

A relaxed atmosphere at a disability hearing, devolving directly from the Hearing Examiner, always is of help. Claimants need to feel as much at ease as possible. So do all others present. Only this milieu can encourage the freest possible exchange of information and commentary between those present—how often vital facts, nowhere to be found in the "records of evidence," thus are brought to light!—and it is this which leads to the eventual goal of all hearings, the wisest and fairest possible disability decision by the Hearing Examiner.

Chapter IV

While the legal restrictions governing the procedures for introducing expert vocational testimony into a hearing record, and the weight to be given it in adjudication have considerable flexibility, there are parameters which must be recognized and accepted. The articles in this chapter represent different permissible techniques of preparing for hearings and improving relevant knowledge used by Vocational Experts of varied backgrounds and experience as reflected by their content. The evolutionary nature of the Vocational Expert program is evident in comparing techniques and views of a person relatively new to the program with those of the experienced witness. Other chapters also reflect this evolutionary process and the foreseeable future, educational, and professional needs of Vocational Experts.

A Decennial Perception of the Vocational Expert's Role and Function in Hearing Procedures

Joyce M. Chick

A survey of the literature in the fields of law, psychology, guidance and counseling, and habilitative sciences reveals rather quickly that little has been written concerning the professional role of the Vocational Expert. The reason seems obvious, for it is only within the last decade that professional personnel have been used in the role of expert witnesses with any degree of frequency in judicial or quasi-judicial proceedings.

Vocational Experts may have been used to a very limited degree in some types of judicial settings prior to the initiation of the Vocational Expert Program by the Bureau of Hearings and Appeals of the Social Security Administration. However, the program initiated by the Bureau in 1962 was the first formally organized effort to utilize Vocational Experts in quasi-judicial proceedings on a contract basis. Today, a decade later, some 650 Vocational Experts are under contract with the Bureau. A number of these Vocational Experts are also testifying in legal court proceedings and serving as consultants to law firms, businesses, and to other agencies in private negotiations. Without question, the pioneer program of the Bureau of Hearings and Appeals has brought into full focus the value and services that can be rendered by competent and professionally-qualified Vocational Experts.

In this decennial year of the Bureau's Program, it is both appropriate and timely to look at the role of the Vocational Expert.

The purpose of this paper will be to focus on the Vocational Expert's role as it is currently defined by the Bureau (leaving any further explanation of the history of the role to archives of the Bureau). To avoid "remanding" the role of the expert witness to individual life-style perceptions of how Vocational Experts differ in their expressed views of the role, this paper renders an independent perceptual finding on the role of the Vocational Expert. Due consideration has been given to evidence from written documents developed by the Bureau of Hearings and Appeals and other professional literature sources, as well as to personal testimony given in many situations over a number of experiential years. With this introduction and explanation, it seems appropriate now to proceed with the "hearing" on the role of the "Vocational Expert", whose title is so designated and whose function is now a decade of age.

Webster defines an expert as one who is a specialist—a master in regard to ability, a connoisseur or judge, or as one who has acquired a special skill or knowledge of a particular subject and is an authority. Expertise is defined as an expert opinion or commentary. In contrast, Webster defines a consultant as one who discusses or confers (talks), or as one who gives professional advice or services; in essence, "a conferee." [1] Although the terms "Vocational Consultant" and "Vocational Expert" are frequently used as synonymous in meaning, it is contended that the interchangeable use of these terms produces confusion in the role of the Vocational Expert as his function is defined and intended by the Bureau of Hearings and Appeals. A statement not infrequently heard is that Vocational Experts want to do more than testify—they want to counsel the claimant and sometimes confer with the Hearing Examiner.

The Bureau has designated the title of the professional role under consideration in this paper as that of the "Vocational Expert." The reason for this choice of title seems highly self-explanatory when viewed in the context of forensic behavior; however, when viewed within the framework of how one sees himself personally, real and intended meaning may be obscure. The purpose of the Vocational Expert is to provide upon request, as a specialist in the field of vocations, expert opinion and knowledge regarding the residual and transferable work skills and capabilities of an individual. The expert witness in this particular program role serves as a consultant only to the extent that, in providing testimony, a service is rendered. Beyond this point, the role of the Vocational Expert witness loses the characteristics identified with

[1] *Webster's Seventh New Collegiate Dictionary*, G. & C. Merriam Company, Springfield, Massachusetts, 1965.

the role of a consultant, since in the usual definition, the expert witness is not in the role of a discussant or conferee. The Vocational Expert witness provides, through an expert opinion based on specialized knowledge, that information which is requested; he confines any testimony given exclusively to this realm, avoiding the human tendency present in most situations to discuss the "maybe's, probabilities and likelihood predictions" or to serve as a conferee to either the claimant or Hearing Examiner. The contention is held that it is extremely easy to lose sight of the distinction of the performance functions designated by the title. Huxley writes that "Words are magical in the way that they affect the minds of those who use them. Words have the power to mold men's thinking, to canalize their feeling and to direct their willing and acting." [2] Even more important is Bergman's statement that the meaning of a term is to be found by observing "what a man does with it, not what he says about it." [3] Vocational Experts under contract with the Bureau of Hearings and Appeals need to think of themselves as *Vocational Experts*. The job title designates the job role and function. In this regard, role and function are defined synonymously and refer to official position; the action for which a person is specifically fitted, and for which something exists, and is inclusive of those acts expected of a person.

The Vocational Expert, as a highly skilled professional, utilizes (as does any professional) certain basic tools and procedures in the preparation of functioning in this role. It is assumed that expertise in this particular role is attained through adequate interest, formal preparation, experience and continual in-service training in the specialized area of vocational counseling, psychology, guidance and the habilitative sciences. Based on these assumptions, the inherent characteristics and procedures involved in the preparation of testimony for a hearing appearance will not be further addressed in this paper, i.e., reading and preparation procedures and the tools used, such as reference resources, vocational survey information and knowledge of the industrial settings. Instead, focus will be given to the actual role-function performance of the Vocational Expert in the hearing procedure, and within the framework of the statutory disability provisions, as conducted by the Bureau of Hearings and Appeals.

The "sine qua non" of the Vocational Expert's role and function

[2] Huxley, Aldous, *Words and Their Meaning* (Los Angeles: Zeiflin, Jake, 1940) p. 3. Cited by Hayakawa, S. I., *Language in Thought and Action*, (New York: Harcourt Brace, 1949), p. 162.

[3] Bridgeman, P. W., *The Logic of Modern Physics* (New York: Macmillan Co., 1927), p. 208.

is adequately spelled out in a Hearing Examiner's opening statement in preparation for the taking of vocational testimony. It is frequently expressed by the Hearing Examiner as follows:

> And do you understand that although the government is paying you a fee for your appearance and testimony in these proceedings, that your testimony is to be that of an impartial witness—that you are appearing here to testify neither for or against the government or for or against the claimant?"

This is the crucial, absolutely indispensable and essential element in any hearing procedure that enables a Vocational Expert witness to fulfill in an ethical and professional manner his intended role and function. Although the Hearing Examiners spell out this critical element, as evidenced in the opening statement of testimony, it is also essential that Vocational Experts clarify, in their own thinking, their neutral role and that they educate themselves repeatedly not to prejudge on the basis of written documents examined by them prior to the hearing, the merits of a case in a favorable or unfavorable manner. It is the Hearing Examiner's role and function to reach a decision in any hearing; the Vocational Expert must remain neutral, objective and open to the flexibility required when new and different information emerges from the total testimony presented in a hearing.

It is at this juncture that the understanding, knowledge, role and performance function of the Hearing Examiner becomes vitally interlaced with the performance of the Vocational Expert in giving testimony. Without question, the Hearing Examiner serves as the enabling catalyst to effective vocational testimony in any situation. It is equally important that the Vocational Expert thoroughly understand the role and function of the Hearing Examiner. In this respect, it is impossible to discuss either role as a separate entity, or to divorce one role from the other.

Once the roles of the Vocational Expert and of the Hearing Examiner are understood, each by the other, it is extremely helpful to the Vocational Expert and to the facilitation of the total proceedings in general to have the Hearing Examiner expressly clarify for the claimant (and for the counsel, when present) what is meant by "impartial testimony," how the testimony of the Vocational Expert will be used in reaching a decision in the case, and the role of the Vocational Expert. This effort is helpful in every hearing. However, it is especially necessary when a claimant borders on illiteracy or when the claimant or his representative is unfamiliar with the Bureau's procedures. Not infrequently, this effort results in reduced time spent in cross-examination of the Vocational Expert, since the expert's role and function has been

adequately explained in layman's language to both claimant and counsel. Such an explanation also accomplishes another purpose: it tends to lessen anxiety and tension on the part of the claimant, in most cases facilitating ease of communication, and it is an act of human kindness that does not preclude impartial and objective proceedings or findings. Finally, this effort may serve the important function of helping the claimant to think of himself in more positive and less disabling terms regarding any residual capacities retained by him that can yet be utilized in gainful employment. The latter statement is based on the contention that when a claimant understands the role of the Vocational Expert, he is not as likely to resent his presence or his testimony or to cast the Vocational Expert in the role of a witness who is present only to testify for the government.

The explanatory approach of one Hearing Examiner that I find to be exemplary in accomplishing the aforestated purposes is the following: "The person seated to my left is Dr. ——— and in this instance "Dr." stands for a Ph.D. and not an M.D. (medical doctor degree). She (he) is an expert in the field of vocations and you were notified in your notice of appearance for hearing that she (he) would be present today to offer testimony related to jobs and work.

If, when your hearing is concluded, I should find that you cannot go back to your regular and former work for medical reasons, then it would be helpful to me to have an expert opinion regarding whether or not there are other types of lighter work that you could do and whether or not these jobs of lighter work exist in large enough numbers that you could reasonably be expected to find employment in these areas.

Her (his) testimony and expert opinion will be based on certain assumptions or factors that I will state and ask her (him) to assume. Now this person is not here to say that you are or are not disabled; that is my job based on the medical evidence in your case—and she is not here to find you a job. Do you believe you understand why this person is here as I have just explained to you? . . .

When I reach a decision in your case, I do not have to agree with all of her (his) testimony, nor am I bound by it, but I will consider it along with all other testimony and evidence in reaching a decision in your case."

With such an explanation as that cited above, the role of the Vocational Expert is clearly defined for the claimant and, in fact, this approach also serves to verify again the role of the Vocational Expert in the proceedings.

The Vocational Expert, who is then supplied with concise and clearly stated hypothetical assumptions from the Hearing Examiner, as a method of eliciting testimony, is able to perform as an expert and to provide testimony in an impartial manner.

Hypothetical assumptions, recognizing the characteristics of the real claimant who is present, enable a Vocational Expert to testify in a "matter-of-fact" and concrete way and to avoid the trap that elicits useless information such as "likelihoods," "maybe's" and other probability statements. In this respect, the Vocational Expert should be able to support his testimony and document his opinions with facts and first-hand experiences and information. If secondary sources are utilized, the expert should state this fact and be able to provide documentation in support of their use. Although it is generally assumed that certain types of evidence and testimony are admissible in the quasi-judicial settings of the hearings of the Bureau of Hearings and Appeals that would not be admissible in a court of law, the credibility assigned to any testimony rests, at least in part, on adequate documentation provided by the expert witness.

A subject and event that is frequently ignored in respect to providing expert vocational testimony is that of the cross-examination of the Vocational Expert by counsel of the claimant. For many Vocational Experts this is an anxiety and fear-provoking experience, but for the well-prepared and adequately trained Vocational Expert, it is an opportunity to test his skills and knowledge and his ability to document the testimony given. It is, in essence, an intellectual challenge—and this challenge can most effectively be met through cool, calm, professional composure enhanced by a pleasant disposition and, above all, honest, straightforward replies to all questions encountered. If a Vocational Expert does not know the answer to a question in cross-examination, he should, in the simplest terms, say so. If he does not understand the question addressed him, he should ask to have the question repeated or clarified. To attempt to answer a question that is unclear in meaning is frequently professional suicide. In many instances, the Hearing Examiner will rule whether or not the question is appropriately stated, pertinent to the proceedings under consideration, and required to be answered. Vocational Experts should be ever cognizant that it is the responsibility of the Hearing Examiner to conduct the entire proceedings of the hearing and refer to them for advice as situations dictate.

Although "flexibility" is a desirable characteristic in hearing procedures, and although the degree of flexibility encountered is determined by the individual Hearing Examiner's methods of conducting a hearing, it should not be abused by Vocational Expert's

offering essentially more testimony in the hearing than that which is asked for by either the Hearing Examiner or counsel for the claimant. Vocational Experts frequently feel they have made some observation in the hearing that has perhaps gone unnoticed by the Hearing Examiner or, when called upon to testify on the basis of hypothetical assumptions, find it difficult to confine their testimony to the framework of the stated hypothetical. Years of experience support the use of caution in this matter by the Vocational Expert. The Vocational Expert may find that he has either cited an irrelevant matter, or one already in the Hearing Examiner's awareness, or that he has waded into issues that cannot be supported by prepared documentation. Again, it is the Hearing Examiner's prerogative to conduct the hearing; only when invited to make general observations, other comments or to raise questions should the Vocational Expert enter this domain. As a matter of hearing procedure, courtesy and role definition, it is always advisable to approach any questions to be asked of the claimant upon permission of the Hearing Examiner or by requesting that the Hearing Examiner clarify needed information through questions to the claimant.

In order to function in an effective manner and provide expert vocational testimony that is, in fact, helpful to a Hearing Examiner in reaching decisions, the Vocational Expert can never "rest upon his laurels" of training and experience. The expert must be continually engaged in a self-motivated, self-provided, in-service training effort if he is to remain an "expert." The characteristic of certainty in our society today is that of "change." The world of work is perhaps more dominated by this characteristic than any other element in our society.

What may have existed in the world of work yesterday may no longer exist by tomorrow, due to technological intervention, automation, government regulations, demand and supply for the gross national product of goods and services, or legislation affecting the work laws in our country. A job today that would actually allow for the transferability of skills from residual capacities of a claimant may be characterized tomorrow by automation which has either done away with the need for those particular skills, reduced them in number, or now requires a whole new set of skills. On the other side of the coin, this same situation might create new jobs or alter existing work demands in other jobs, thus creating new employment opportunities in the light-to-sedentary ranges of employment.

The Vocational Expert must make a constant effort to be knowledgeable about the national, regional and local job markets, including the changing characteristics of the national and regional in-

dustrial scene. Up-to-date knowledge and experience in job demands, labor trends and work settings is an absolute necessity to the expert. Needless to say, the transferability of skills is the key component to be considered in using this knowledge.

Addressing the fact that the need for and the role and function of the Vocational Expert has been developmental over the last decade, it must be recognized that professionals serving in this capacity have not had the advantage of well-defined role models of behavior for the improvement of their performance. Vocational Experts have, in essence, had only two professional role models to draw upon: themselves and their own experiences, and a systems model developed and pioneered by the Bureau of Hearings and Appeals. Training programs, in which both Hearing Examiners and Vocational Experts are involved, are essential to future "refine" the now relatively well "defined" role of the Vocational Expert. Feedback and evaluation are essential elements for any aspect of improvement and growth. In order to effect feedback, channels of communication must be established, kept open and be used regularly, so that growth and increased proficiency in performance can be accomplished. In this age of accountability to ourselves and to our society we must, as one noted educator has expressed it, "not be afraid to bite the bullet." In essence, we must look at ourselves, our own performance, and how we may improve what we are currently doing. In addition, everyone needs feedback and input regarding how *others* view their performance. To do less is to be satisfied with the "status quo" which eventually leads to stagnation.

Although I have never heard it expressed, the "raison d'etre" undergirding the existence of the Bureau of Hearings and Appeals in the Social Security Administration of the United States Department of Health, Education, and Welfare is undoubtedly the concern for human welfare. The role and function of the Vocational Expert, as a part of this program effort, must also be viewed as another humanistic effort to enhance impartial and just decisions regarding the employability of our citizenry. This basic goal sometimes becomes clouded by the intricacies and vastness of the nature of judicial and quasi-judicial laws and procedures. The motivating factor, basic to the role and function of the Vocational Expert, should also be a concern for human welfare.

In summary, as the pioneering efforts of the Bureau of Hearings and Appeals move into a second decade of growth, it is profitable to look backwards to the developmental history of the Vocational Expert and to the criteria set forth for present performance skills. However, this is not enough—as is so aptly expressed in Gibran's concept of a focus for the future: "So saying, he made a

signal to the seamen, and straightway they weighed anchor and cast the ship loose from its moorings and they moved eastward." The signal of prediction for the future is the growth, development, refinement and professional recognition of the role and function of the Vocational Expert.

The Value of the Vocational Expert Program for Counselor Education and Practice

Daniel Sinick

Serendipity has supplied side-benefits to the Vocational Expert program's central success in broadening the basis for sound decisions within the Bureau of Hearings and Appeals and in the courts. The sharpened expertise resulting from their participation in the program has spilled over into other areas where Vocational Experts have professional responsibilities. These areas mainly involve the practice of counseling and the preparation of counseling practitioners, be they rehabilitation counselors, vocational counselors, or counseling psychologists.

Some of the serendipitous spill-off redounds rather directly to the benefit of the social security disability program. At the State agency level of disability determination, for example, both the vocational counselor and the vocational specialist on the staff can be expected to provide added expertise if their preparation has exposed them to counselor educators who have served as Vocational Experts. Such counselor educators are likely to be more effective, too, in turning out counselors who themselves become competent Vocational Experts.

Credit is due the Vocational Expert program, moreover, for ripples that extend far beyond its own purview and purposes. The program's successful provision of vocational inputs to complement medical inputs, its insistent emphasis on the realities of claimant capabilities and job availabilities, and its consistent creativeness in the development of pertinent procedures and materials have caused ripples that continue to refresh and reinvigorate counselor education and counseling practice.

Counselor educators and practitioners have gained new knowledge, new insights, and new perspectives from their association, direct or indirect, with the Vocational Expert program. They have acquired increased understanding of clients through intensive efforts to understand claimants. They have enhanced their understanding of job requirements and work situations through informed use of the *Dictionary of Occupational Titles* and vocational surveys.

More specific aspects of these augmented understandings are delineated in the following examination of the contributions to counseling and counselor education of the Vocational Expert program. Nothing in this presentation is to be interpreted as implying that the Expert may or should pre-empt any of the Hearing Examiner's prerogatives. There are learnings that go beyond the lesser

domain of the Vocational Expert, however, into the larger domain of his work as a counselor or counselor educator.

Understanding Claimants=Understanding Clients

An Expert's thorough pre-hearing study of claimants' folders and his presence throughout the hearings enable him to learn a good deal about persons with various impairments. Together with his expanded knowledge of impairments, he acquires added appreciation of concomitant psychodynamics and consequent residual functional capacities. He thus increases his competence in the synthesis of medical, psychosocial, and vocational data.

Medical Aspects

The Expert is exposed to frequently extensive descriptive medical material in folders, dealing with etiology, symptomatology, diagnosis, treatment, and prognosis. All these medical aspects are further elucidated in hearings utilizing the expertise of medical specialists. Added enlightenment occurs in the interplay of Hearing Examiner, claimant, and medical, vocational, and other witnesses.

Differential diagnosis constitutes a perplexing problem pervading disability hearings. In my very first case as a vocational witness in BHA hearings, the claimant's medical record listed almost a dozen different diagnoses. The medical rationale for each diagnosis threw light on the role of etiology and symptomatology. How medical conditions come about, how they manifest themselves, and how they may be differentiated thus become clearer to the Vocational Expert.

Also clearer is the tentative nature of diagnosis, which many physicians modestly designate as "impressions." As with any other impressions, these are subject to modification on the basis of new and material medical evidence. Diagnoses are made additionally difficult by the dual character of such evidence, for objective data must be weighed together with subjective reports.

Considerable clarity accrues from the informed inputs of medical specialists during hearings, especially under the guidance of able Hearing Examiners. Able examiners guide without leading, thus maximizing the objectivity as well as the relevance of the testimony. Claimants are similarly assisted in the examiner's elicitation of pertinent subjective evidence.

The Vocational Expert's clearer comprehension of medical evidence is facilitated, too, by the Hearing Examiner's hypothetical questions. These questions—pertaining to the implications of different diagnoses and of varying levels of severity within diagnoses —help to highlight the practical meaning of various medical con-

ditions for claimants. Such practical meaning is of obvious value to counseling practitioners and counselor educators.

Psychosocial Aspects

Medical conditions include psychiatric impairments as well as physical ones. Physical impairments are sometimes psychogenic in their etiology or somatopsychological in their symptomatology. Pruning these perhaps pretentious polysyllables, one might simply say that the Vocational Expert is exposed to the impact of the psyche on the soma and vice versa. He gains increased familiarity with the psychological overlay accompanying severe physical impairments and, in general, with the interaction of medical and psychosocial variables.

The broader term, "psychosocial," is employed to emphasize the Sullivanian interrelations of any person with other persons. The secondary gain arising from a primary impairment invariably involves others, usually significant others. Although a patient at times plays a sick role for himself, he often "puts on a show" of being severely disabled for attention, assistance, and other psychic pay-offs.

The literal pay-off of monetary benefits sought by claimants in disability hearings is an expectation that naturally, albeit unconsciously, causes or increases play-acting. In this game that people play—to change the metaphor—the stakes are high and not all the cards are put on the table.

Motivation is thus a major matter to which Vocational Experts are constantly exposed, as are many counselors. Theories of motivation can be put to realistic tests with disability claimants, whose complex situations may well warrant mixed motivations. Confronted by claimants caught in the Hamlet quandary, Experts may eschew simplistic theoretical explanations attempting to account for complicated motivations.

Empirical clues galore are available to the alert Expert through his observation of the claimant during the entire course of the hearing. The claimant's physical appearance, his manner of dress, demeanor, mannerisms, cooperativeness, responsiveness, and related areas of observation throw light on motivation and other psychosocial variables. Clues to these variables accrue from both verbal and nonverbal cues.

One or two simple examples from my experience as a Vocational Expert may illustrate observations bearing on motivation. Other Experts have had similar experiences. A claimant who hobbled into the hearing leaning heavily on a cane walked briskly to the rest room when a short break was called. Another claimant went on

without a break for two hours at a hearing in which she lamented her need to urinate every fifteen minutes.

Vocational Aspects

Such observations, together with other pertinent evidence from the folder and from the hearing, may cast the cold light of reality on a claimant's residual functional capacities. Despite the examples just cited, an impartial Expert through objective observation and unbiased interpretation might discover as many realities about claimants leading to allowance as to disallowance of claims. Outcomes of hearings, however, are not germane to our present purposes, which concern outcomes of Vocational Expert experience that enrich counselor education and practice.

The claimant's residual functional capacities constitute an intermediate outcome in either respect. What a claimant can do with what he has left is a determination by the Hearing Examiner directly affecting how he decides the case. Ultimate outcomes of counseling are similarly affected directly by what a client can do with what he has. While this wording may cause arousal in therapists concerned with psychosexual adjustments, "what a client can do with what he has" pertains here to basically vocational adjustments.

A realization reinforced by experience as an Expert is that what a client can do is not accurately determined through traditional psychometrics. Both the reliability and the validity of psychological testing are open to question with respect to various clienteles, disability claimants clearly included. Motivation toward presenting themselves as disabled is likely to yield a depressed profile of measured abilities. Other factors reducing the applicability of traditional tests include the unfamiliarity of many claimants (and clients) with tests, the inappropriateness of many instruments for particular clienteles, and the unsuitability of available norms, which are often too limited to apply adequately to a particular claimant or client.

A claimant's residual functional capacities, or a client's abilities, can frequently be inferred from evidence more readily available than test results. Besides chronological age and formal education, such evidence includes specific vocational preparation and actual work experience. Where details of training and employment are lacking in the folder, they can be brought out in the disability hearing or in the counseling interview. Much can be learned, for example, from the person's customary or usual work, which may be represented by his longest job, his last job, or his most successful job in terms of skill level or pay level.

Evidence regarding abilities is often inherent, as well, in everyday activities and avocational pursuits. Again, where the folder lacks pertinent details, they can be elicited in person. A woman who spends her time knitting or crocheting may have finger dexterity generalizable to a variety of jobs. A sometimes significant activity is the seemingly simple matter of whether the person drives a car. This skill is required in numerous types of work and may be needed in getting to and from work.

Realizing the Realities of Jobs and Work Settings

The points made in the preceding paragraph serve as a transition from understanding claimants and clients to understanding jobs and job sites. The vocational aspects of claimant understanding were seen as springing in large measure from medical and psychosocial aspects. In addition to the enhanced understanding of all these aspects accruing to counselors and counselor educators from experience as Vocational Experts, there accrues increased awareness of what jobs and work settings are really like.

Focusing on External Realities

Understanding and self-understanding of clients must be complemented by understanding of clients' environments. Some counselors and counselor educators tend toward almost exclusive concern with internal variables in clients' private worlds. Vocational Expert experience unavoidably emphasizes the pertinence of external variables, vocational ones particularly, in the lives of clients.

External variables for consideration in disability cases are limited, however, by the distinction between employability and placeability of claimants. Employability has to do with a claimant's residual functional capacities or vocational skills. Disability hearings do not deal with the question of whether a claimant can be placed in a job—that is, whether he can obtain employment. Placeability is affected by such external variables as employer hiring practices, technological developments, and cyclic economic conditions, as well as by the claimant's motivation and effectiveness in jobseeking.

While placeability or hirability does not fall within the purview of disability hearings, the hearings are concerned with the existence in the economy of work that the claimant is able to do. The Vocational Expert is called upon to testify whether any work the claimant can do exists in the economy "in significant numbers," significance to be determined by the Hearing Examiner. Since the "economy" is interpreted as the region where the claimant lives or

several other regions of the country, the Expert must focus on the external realities of where suitable work does exist.

This focus on the realities of work locus forces counselors and counselor educators serving as Vocational Experts to become familiar with the actual work world. Theoretical discussion of a conceptualized "world of work," use of generalized occupational information obtained from published materials, and other impersonal approaches perhaps applicable to some aspects of counseling are seen as inappropriate to disability hearings. Vocational expertise is based upon personally acquired knowledge.

Such knowledge may come, in part, from a simple source like help-wanted advertisements in newspapers and magazines. Systematic study of job advertisements yields realistic information that sometimes generates new insights. Those unfamiliar with want-ads might regard as eye-openers everyday emphases, for particular jobs, on "mature" or "older" persons and on applicants without experience. Job information that is unexpected or surprising no doubt reflects a needed opportunity for new learning.

Seeing Jobs in Job Sites

A greater opportunity for counselors and counselor educators in need of realistic job knowledge lies in the vocational surveys made by Vocational Experts. Whether formal surveys conducted under BHA authorization or informal ones done as part of pre-hearing preparation, such visits to places of employment enable Experts to enrich their knowledge of actual jobs and of the settings in which jobs are performed.

Contributing significantly to this enrichment is the emphasis in vocational surveys on jobs of a blue-collar, routine clerical, or service nature. These types of jobs are far less familiar to white-collar professionals than work calling for years of advanced education. The widened view thus obtained of the generality of jobs can in turn broaden the occupational vistas of countless counselees.

What may Vocational Experts see in visiting job sites? The job sites or work settings themselves may represent a void in many Experts' own advanced education. The physical location of places of employment and the transportation required to get there may constitute new data for degree-holders holed up in carpeted comfort. The heat, noise, and vibration commonly encountered in blue-collar work settings may set Experts' teeth on edge but make them painfully aware of these realities. They become aware, on the other hand, of job sites with diffused lighting, relaxing music, and tasteful cafeterias.

Machinery and equipment of all kinds can be seen. Terms like drill press and rotary lathe become part of the Experts' language. Fine finger dexterity takes on a finer meaning, as does rotation from task to task. Paced work on an assembly line can be distinguished from similar work performed without undue pressure of automation or supervision.

Light and sedentary jobs become particularly familiar to Vocational Experts. When they see the same job performed by some workers sitting, others standing, and still others alternately sitting and standing, their perceptions of job requirements are accordingly broadened. They can also sharpen their perceptions by ascertaining, for example, the percentage of time spent sitting or standing during a normal work day, or by determining whether a single upper limb would suffice for a particular job.

Alert Vocational Experts can learn how various jobs have been modified to accommodate injured employees. Equipment controls like switches and levers are sometimes changed so that they can be operated by one hand, or by the left instead of the right. Hand controls can be changed to foot controls, and vice versa. Tools ordinarily requiring two hands may be modified for use by one hand.

Job elements with excessive physical demands can be assigned to another employee, who carries completed work, for example, to the next work station. Visual requirements of an exacting nature involved in inspection of some completed work can similarly be accomplished by a centrally situated inspector. Experts' observation of a variety of actual job modifications can stimulate their imagination toward the creation of added opportunities for clients with physical limitations.

Integrating Realities of Clients and Jobs

Intensive efforts to understand the medical, psychosocial, and vocational aspects of claimants, it has been suggested, augment the Vocational Expert's understanding of clients. His extensive exposure to external realities, particularly through the use of vocational surveys, supplies the expert with realistic knowledge of jobs and work settings. These two areas of increased knowledgeability —clients and work—are also more capably bridged as a consequence of experience as an Expert.

The name of the bridge, transferability, is familiar, but proficiency in playing the game comes from practice. Disability cases provide ample practice in ascertaining transferability of claimants' residual functional capacities or vocational skills to particular fields of work and to specific jobs.

If transferability of skills is a bridge, its supports are the four parts of the *Dictionary of Occupational Titles*: Volumes I and II and the two supplements. Volume I, though substantial, does not carry as much weight in this respect as its size might suggest. Volume II is the mainstay of the transferability bridge, with the two supplements supplying important underpinning.

The Volume I job descriptions, the Vocational Expert recognizes increasingly, must be tempered by what claimants actually did, as indicated in the folders and in the hearings, and by how the jobs are actually performed, as revealed in vocational surveys. The assistance afforded by the other three parts of the *D.O.T.* must be similarly seasoned with the salt of reality. Nothing between the covers of books can accurately portray what occurs between a particular person and his actual environments.

Volume II and the supplements nonetheless assist considerably in the bridging of claimants and jobs. The enforced exposure of Experts to the intricacies of these detailed *D.O.T.* materials develops a sophistication commonly lacking in counseling. My own experience as an Expert enriched the discussion of the *D.O.T.* in my book on *Occupational Information and Guidance*, published by Houghton Mifflin in 1970. Publications by Experts represent a potentially pervasive way that BHA experience may be shared with counselors and counselor educators.

The single alphabetical arrangement of Volume I is far exceeded by the numerous Volume II avenues to fields of work. Level of complexity with respect to data, people, and things, as indicated by the last three digits of the *D.O.T.* code number, leads to job possibilities consonant with claimants' capacities. Appendix A of Volume II facilitates the use of the last three digits, while Appendix B analyzes a whole array of worker trait components of central significance to transferability.

Additional transferability avenues in Volume II include the many worker trait group pages that delineate such details as occupationally significant worker characteristics, clues for relating clients and jobs, pertinent qualifications profiles, and related worker trait groups. Too often overlooked as an avenue toward transferability is Volume II's Industry Arrangement of Titles, which offers lists of jobs according to product manufactured, raw materials used, process or activity involved, and service rendered.

The two supplements to the *D.O.T.* constitute a significant contribution to the field of counseling by the Bureau of Hearings and Appeals, which each supplement credits—through an acknowledgment to Louis Zinn—for "advice in the planning and development of this publication." Both supplements systematically supply detailed data regarding physical demands, working conditions, and

training time, as these "selected characteristics" apply to specific occupations. The first supplement is basically entered with each occupation's *D.O.T.* code number, while Supplement 2 is basically entered with the worker trait group page number from Volume II. Either supplement can be entered through other columnar captions, as well, in search of occupations in keeping with client characteristics. The Vocational Expert's use of these supplements heightens the expertise he brings to counseling or counselor education.

Serendipity Does Not Create Serenity

Despite the undoubted value of the Vocational Expert program for counselor education and practice, one cannot conclude that service as an Expert solves all the vocational problems encountered in counseling. The host of serendipitous side-benefits should not yield a sense of serenity. Complacency in the face of counseling's complexities would be counterproductive.

Thorny problems that occur in the course of service as a Vocational Expert are lightly touched on here, with the thought in mind that thorns exist even in a bed of roses. The Expert's opinion regarding the claimant's employability is complicated, for example, by a symptom as subjective as pain. Recency and relevance of military experience can be complicating factors. Responsiveness of the claimant during the hearing may be alternatively attributed to auditory adequacy, functional intelligence, verbal comprehension, or communication skills. Disparities are found between *D.O.T.* ratings of selected occupational characteristics and the ratings of employers in specific work settings.

Mention of employers is a reminder that serendipitous value accrues to Experts from the conduct of vocational surveys. Making contact with employers and talking with them about jobs are reality oriented experiences frequently lacking in the lives of counselors and counselor educators. Contacts with local State Employment Security offices and with other community resources are similarly enriching reality experiences.

One can conclude that, while service as a Vocational Expert does not resolve all the complexities of counseling, it provides realistic experience that sharpens counseling expertise. While everything an Expert learns about claimants may not be generalizable to clients, his understanding of clients is unquestionably enhanced by his study of claimant folders and his participation in disability hearings. While his knowledge of jobs and job settings may remain limited, his more realistic view of the work world is less likely to be distorted by tinted glasses, whether rose-colored or

gray. While the bridges he builds between clients and jobs may not be more indestructible than the bridge over the River Kwai, he gains considerably in his constructive capacity to connect workers and work. The Vocational Expert program itself serves as a bridge, indeed, between the realities of clients, jobs, and job settings and the professionals concerned with counseling.

An Industrial Psychologist Views the BHA Vocational Expert Program

Philip Ash

When the Bureau of Hearings and Appeals of the Social Security Administration launched the Vocational Expert program in 1962, it did so to deal primarily with requirements, imposed by the courts that reviewed disallowed claims for payment of disability benefits, for dependable evidence based upon professional opinion that claimants to such benefits were in fact employable, given their age, educational attainment, previous work experience, and such impairments as time, disease, or accident may have visited on them. The Bureau of Hearings and Appeals pioneered in the organized utilization of professional personnel from psychology, counseling, education, and related fields, in the judicial process.[1]

In fact, however, only a small proportion of cases in which Vocational Experts serve ever reach a court.[2] Most of the time the Vocational Expert provides adjunctive help to the Hearing Examiner and serves as sort of an insurance policy. His testimony is on the record if a denial of benefits is contested in the courts, and, in cases where the Hearing Examiner himself has doubts about the implications of the medical evidence for "availability for employment" of the claimant, the Vocational Expert provides an outside view of the claimant's occupational potential, given different disability alternatives posited by the examiner.

The industrial or counseling psychologist who participates in these proceedings, however, quickly discovers that the frame of reference in which they are conducted, oriented to the terms of the law, are at once both narrower and broader than typical personnel practice. The boundaries are set as follows: ". . . an individual . . . shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work, but cannot, considering his age, education, and work experience, engage in any kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him or whether he would be hired if he applied for work.[3] The phrase

[1] Easton, H. K. *Forensic Issues as Related to the Vocational Expert's Participation in Social Security Disability Hearings.* Dissertation submitted to Northwestern University for the Ph.D. degree, (1969) p. 7.

[2] In 1965–70 there were 126,150 hearings before BHA Examiners. Vocational Experts participated in 38,430. It is estimated that approximately 5% of these cases went to court for appeal from a BHA decision.

[3] 42 U.S.C. 423 (d) (2)A, January 2, 1968.

"work which exists in the national economy" is further defined to mean ". . . work which exists in significant numbers either in the region where such individual lives or in several regions of the country."

Taken together, these boundaries require the Vocational Expert (a) to take the individual as he is (i.e., not change or rehabilitate him), and (b) to match his residual skills and abilities with *existing* (not necessarily open to him) jobs.

The first boundary is much narrower than that which would be observed if the claimant appeared before the Vocational Expert as a client in need of vocational help or an employee in need of counsel. The Social Security Administration program at least nominally includes screening by state vocational rehabilitation agencies for possible vocational rehabilitation services, but the practicing Vocational Expert quickly learns that there is a broad gap between theory and practice. State regulations concerning eligibility for rehabilitation rule out, in my judgment, many claimants who, were the resources available, could be "rehabilitated." Typically, such claimants are not "impaired enough". A case in point is the heart attack claimant who has made a reasonably good physical recovery, but suffers from continuing cardiac anxiety that effectively causes him not to return to work. The resources of rehabilitation agencies are probably too limited to help all those who need their services, but in my practice all but a few claimants could have benefited from rehabilitation counseling.

The second boundary,—"work which exists in significant numbers"—on the other hand, is much broader than vocational counseling outside of the disability law would contemplate. It *does* tend to assure ignoring jobs which are unique and of infrequent occurrence, and jobs which exist only to provide work for a disabled person—one disabled usually during the course of employment with the company.[4] However, resolutely eschewing considerations of *placeability* (would any employer actually hire an individual with all the attributes of the claimant?), emphasis is placed upon formal matches between putative job skills and formal job re-

[4] For example, in a steel mill with which I am acquainted, there is a tunnel connecting two parts of the plant. Entrance into and egress from the tunnel is controlled by traffic lights, and drivers can see around the bends at each end of the tunnel in strategically-placed mirrors. However, to continue on the payroll an employee who was severely injured in a plant accident, the company created the job of "Tunnel Watcher". This worker sits on a chair through the shift watching cars and trucks enter and exit from the tunnel. He could control the traffic lights if the need arose, but it probably never will. This is a make-work sedentary job. The French have institutionalized such jobs as, for example, the ticket-taker ladies who sit at the entrance to the platforms in the Paris subway. These are for the most part widows of French soldiers. The "jobs" provide income supplementation to war pensions.

quirements, ignoring the qualitative labor market factors that might make the likelihood of actual hiring remote. The first lesson that the industrial psychologist participating in the Vocational Expert program must learn is that he must address himself to the *possible*, and not confine his analysis to the *probable*. An important implication of this lesson is that he must frequently shut out or unlearn or ignore the hiring standards with which he has become familiar in his own company. The experience is, none the less, an instructive one. In fact, considering for hearing purposes the *possibility* of employment in particular jobs of persons with a variety of functional limitations may well lead to reevaluation of the validity of the hiring standards imposed by his own company. Evaluation of the availability for employment of disability benefit claimants not infrequently underscores the arbitrary and irrelevant nature of many industrial hiring standards. Going even further, a psychologist employed full-time in industry who participates in the Vocational Expert program cannot help but become more aware of the potential employability of individuals with partial limitations on their physical and mental capacities and abilities. From this awareness, he can more effectively urge upon industrial managers not only the need, but also the desirability, from the point of view of industry's own self-interest, of hiring handicapped individuals to work in jobs on which their handicaps would make no difference in performance.

Beyond these considerations, however, the setting of the disability claim hearing and the constraints (indicated above) that are imposed both by the law and the practices of the Bureau of Hearings and Appeals, present a number of problems to which it would be desirable to direct attention and, hopefully, research. Two of these problems are singled out for discussion: The evaluation of client capacities and potential, and the identification of opportunities for "substantial gainful employment" existing "in significant numbers". These are the two central issues confronting the Vocational Expert: what jobs the claimant does, and what is the incidence of those jobs. The knowledge and techniques of industrial psychology are, in my judgment, highly relevant to the search for solutions to both of these issues.

The question of what jobs the claimant can perform has two aspects, classifiable in the occupational literature as worker capacities analysis and job requirements analysis. The former relates to the education, training, experience, aptitudes, skills, and physical capacities of the applicant; the second to the knowledges, tools, materials, equipment, processes and physical surrounds of the position. The role of the Vocational Expert is to determine the former, and identify jobs which are congruent with these capacities.

In most cases, the Vocational Expert must evaluate worker capacities, at least before the hearing, on the basis of the miscellaneous materials in the file received by him in the mail. I have on other occasions commented upon the (frequent) inadequacy of this source material [5] for evaluating the applicant's capacities, and the limitations of generally-available job information—particularly the *Dictionary of Occupational Titles*—for identifying job requirements.

To meet this problem, both others and I have proposed alternative approaches to the collection particularly, of applicant data: pre-hearing examination of the client by the consultant, physical capacities analysis in work-relevant terms by the physician,[5] re-evaluation and amplification of the exhibits, research on selected tests of capacity or ability, critical analysis of claimant case studies, studies of long-range vocational and/or life adjustment of claimants.[6]

The in-person evaluation of disability-claimant capacities, however, is often confronted with a certain reluctance on the part of the claimant to demonstrate the limits of his capacities, skills, and abilities. To do so undermines his claim to being disabled. Most psychological tests of ability, however, require test-taker cooperation to elicit an estimate of maximum performance potential. The natural reluctance of the claimant to show how good he is would presumably lead to less than maximum performance, to faking in fact, and consequently an *underestimate* of the claimant's job potential. Traditional paper-and-pencil performance test technology therefore does not appear to offer any satisfactory way of motivating a claimant "to do his best" on a test, when such a level of performance could lead to the conclusion that he, the claimant, is in fact not disabled enough to be unavailable for employment. The psychological test route asks the claimant, in a sense, to testify against himself, but usually provides him with the opportunity to avoid doing so.

It should be noted in passing that the malingerer has a much more difficult task of avoiding testimony against himself on medical evidence. Although he may complain of "feeling poorly", of

[5] Ash, P. "Some Notes on the Role of the Vocational Consultant in Disability Hearings". Paper before the American Personnel and Guidance Association, Minneapolis, Minn., April 14, 1965, p. 2–5. In *Documents of Interest to Vocational Consultants*, U.S. Department of Health, Education, and Welfare, Social Security Administration, Bureau of Hearings and Appeals, November 1965, Section IV.

[6] Baer, J. "Research Needed by the 'New' Vocational Consultant." Paper before the American Personnel and Guidance Association, Washington, D.C., April 1966. In *Documents of Interest to Vocational Consultants*, U.S. Department of Health, Education, and Welfare, Social Security Administration, Bureau of Hearings and Appeals, June 1966. Section III.

pain, of lack of sensation, of a whole variety of subjective symptoms, the techniques of medical diagnosis—the X-ray, the cardiogram, the blood analysis, the sphygmomanometer, the neural reflex examination procedure—all do result in forcing the claimant to testify "against himself" without much possibility of deliberately affecting the measurements taken. However, a few new techniques of human assessment have emerged during the last decade, and Vocational Experts may well find in them more precise tools to evaluate the occupational potential of disability claimants. Two tools to which attention is particularly addressed are job element examining and man-job matching.

The first is an examining procedure developed by the United States Civil Service Commission especially to evaluate the qualifications of individuals for "wage board" (i.e., service, production, and maintenance) jobs in the Federal government.[7] While designed to provide scores to determine eligibility for civil service employment, the procedure seems to be eminently adaptable to man-job matching for disability-placement purposes. The procedure, applied to this purpose, has three main steps: analysis of target jobs to develop for each the job elements (broad job-required attributes or activities) that would comprise a qualification standard; development of a suitable device for claimants to use in describing their ability, experience, and training (a modification and expansion of the claimant's application form, probably to be completed upon the occasion of filing for a hearing before the Bureau of Hearings and Appeals); and development of a plan or rating guide for target jobs to establish the congruence of the claimant's capacities and abilities with the requirements of each job or job family. Since no one has yet attempted to apply the Job Element Examining technique to disability evaluation, several technical problems must still be solved. The technique gives promise, however, of more reliable client evaluation without the use of psychological tests the results of which the claimant could compromise by malingering and failure to cooperate.

Another innovative technique, for which some experience in the area of disability evaluation has already been accomplished, is the Cleff Job/Man Matching System, developed by Dr. Samuel H. Cleff, Vice President of Research and Development of ADP Personnel Data Systems, Inc.[8]

The heart of the technique is the matching, by computer, of the characteristics of an applicant (or claimant) with the characteris-

[7] U.S. Civil Service Commission. *"Job Element Examining Instruction Manual."* Washington, D.C.: The Commission, 1967.
[8] Cleff, S. H., and Techt, R. M. *Job/Man Matching in the 70's.* Datamation, February, 1971.

tics of a stored bank of jobs, both job and man described in a common behavioral job language comprising sixteen dimensions of work, each represented by sixteen common job behaviors. In practice, an examining physician *or* a Vocational Expert *or* the claimant should be able to check which of the job behaviors are within the competence of the claimant. This claimant protocol could then be matched by computer with previously-stored job profiles to determine what if anything, the claimant can do. Cleff's organization is currently reported to be doing just this in cooperation with the New Jersey Rehabilitation Commission for some of the Commission's clients. A procedure has been developed for analyzing the client's physical and emotional capacities using the same sixteen dimensions of work, thus providing a vocationally functional profile of the client. A job register containing some 250 job profiles, developed for the New Jersey Employment Service, provides a large sample of jobs against which the person-profiles are compared. The matches reveal a set of jobs to which the client may be referred or which can serve as a realistic basis for planning vocational rehabilitation. Given no more than current computer resources, it is not at all fanciful to imagine a centralized job information bank, accessible by remote terminals (a procedure now used, in fact, by the Cleff organization) against which the Vocational Expert, or BHA itself, could match a client protocol, to yield a printout of jobs in any community suitable to the capacities and abilities of the claimant.

Other new job and worker analysis technologies are also developing which may be relevant to evaluation of the occupational potential of disability claimants, but the two described above have passed the point of speculation and experimentation, and are available for modification and use in disability evaluation.

The second major issue to which the industrial psychologist as Vocational Expert must address his attention is the issue of the incidence *in the economy* of jobs which the claimant may perform. It is not enough to prove that a claimant could perform the job of "glass shader" (matching lenses for inexpensive sunglasses) or "sample mounter" (glueing or posting exhibits on cardboard sheets), but that these jobs constitute work ". . . which exists in significant numbers in the region where such individual lives or in several regions of the country".

The *Dictionary of Occupational Titles* provides evidence of the existence *somewhere* in the national economy, in the recent past if not now, of over 22 thousand jobs, and in the early days of the Vocational Expert program resort to DOT listing was generally deemed sufficient to establish the proposition that there were some jobs which a claimant could perform. The Second Edition (1949)

was supplemented by the publication of *Estimates of Worker Trait Requirements for 4000 Jobs* (1957), which gave the Vocational Expert some basis for making judgments of job requirements in the areas of physical demands, working conditions, and training time. Volume II of the Third Edition (1965) purports to provide physical demands, working conditions, educational and training time (Worker Traits) data for all 21,741 defined occupations. However, it does not include detailed data on these worker traits in the manner in which they were presented in the *Estimates of Worker Trait Requirements for 4000 Jobs* (1957). Therefore, a Supplement for the D.O.T. was published in 1966 to take care of the above problem. *Supplement II of the D.O.T.*, published in 1968, rearranges the data found in the Supplement so that each Worker Trait Group contains jobs requiring similar physical demands, abilities, traits and functions; a useful tool for transferability of skills.

The D.O.T., however, does not speak to incidence, nor does it provide any regional data.

To fill in this lack, the Vocational Expert has had recourse to three sources of information.

The first comprises the "Help Wanted" columns of local newspapers. If a collection of jobs can be identified by matching the claimant's capacities with the D.O.T. statements of job requirements, it is, in fact, frequently possible to substantiate job "existence" through the advertising columns of newspapers. In general, however, such substantiation is possible only for higher-skilled jobs, which are suitable for only a small minority of claimants.

The second approach available to the Vocational Expert is a local vocational survey which he himself conducts. Where there are local State Employment Service offices catering to the handicapped worker, a single stop there might yield enough "job existence" data to satisfy the needs of the hearing. Alternatively, the Vocational Expert must himself visit plants and businesses and collect the necessary data. This latter procedure, however, is very time-consuming, and BHA typically authorizes only a few days' work on surveys, limiting sharply the number of plants that can be visited.

The third approach has involved surveys by State Employment Service personnel. These surveys typically cover one or more metropolitan areas in the state and, where they have been conducted, yield the richest harvest of job existence data collected by any means. However, not all State Employment Services have been willing or able to conduct such surveys, and even if they were the problem nationally is so enormous that it would require a large investment of resources to undertake the task.

In an attempt to develop new and other techniques to collect vocational survey data, a program has been launched at the University of Illinois at Chicago Circle, under the title of Project COPE (Chicagoland Opportunities for the Physically Exceptional).

The first product of this project was a directory of facilities and agencies in the greater Chicago area which offer services for those with physical or mental problems—ranging from alcoholism to xenophobia.

The second and major endeavor of Project COPE has been the creation of a task force to tackle the problem of vocational surveys. This undertaking has three main purposes: first, to collect useful data in the Chicago Standard Metropolitan Statistical Area regarding jobs appropriate for individuals with limited education and skills and some degree of physical impairment; second, to compare and evaluate different survey techniques; and third, to provide the student members of the task force with a meaningful educational experience, including both learning of the principles, theories, and techniques (e.g., D.O.T. classification) of occupational information, and practical exposure to industry by way of plant visits for job-data collection.

The Task Force first addressed itself to the question of sampling, and constructed, from census data and other sources, a target sample of 2000 companies that met two requirements: first, they were in industry classifications in which (on the basis of data in other surveys) light and sedentary low-skill jobs *probably* exist; and second, they were representative and roughly proportional to the distribution of companies and workers in the SMSA.

A second step was the mounting of a pilot study comparing plant visits (to a sample of 50 companies) with a mail-return survey (150 companies). The results of the pilot study were used to modify greatly (a) the telephone "pitch" used to make first contact with each company, (b) the content of the follow-up letter, and (c) job-data forms. At the time of this writing, three data-collecting techniques are being compared:

a. One thousand companies will each receive a letter requesting cooperation, and at least ten job analysis sheets to complete and return by mail.
b. Another 500 companies will receive the same mailing, but they will be informed that a representative of Project COPE will visit to pick up the forms at a date (two weeks) in the future.
c. Another 500 companies will be asked to cooperate by receiving a visit from a staff member, who will collect job data *in situ*.

The letters and forms have been carefully revised, using a variety of evident and not-so-evident motivation techniques, to maxi-

mize response in each response mode. Preliminary results strongly suggest that all the methods yield usable returns. The complete data will provide a basis for cost-benefit analysis to make possible choice among the methods being tried out. The project will also yield a manual for others to follow, including those elements found most effective in the study. It is hoped that Project COPE will yield a standardized survey package that other universities and social science research agencies could adapt to conduct surveys in their areas, or even, if the mail-return technique proves effective, that BHA could possibly conduct such surveys from a central unit.

This paper has suggested, *first*, that when an industrial psychologist functions as a Vocational Expert, he or she must adopt certain positions or attitudes that differ from those usually governing his or her contribution to industry; *second*, that the Vocational Expert experience provides a vantage-point for urging certain changes in industrial practice; and *third*, that the body of knowledge and techniques comprising industrial psychology can be applied to the solution of some of the central problems of the Vocational Expert activity itself. This roster of points, however, would not be complete without a *fourth*, namely, the professional and ethical obligations imposed upon the industrial psychologist when he functions as a Vocational Expert. It is appropriate to close this paper with a brief restatement of these points.

First, the special attitudes called upon by the BHA hearing procedure are:

a. that the match of the claimant's potential with the requirements of jobs must be based upon the characteristics of the claimant *as he now is*, and not as he might become as a result of therapy, training, or other kinds of intervention; and
b. that the claimant must be matched with jobs that he *could do*, given his age, education, training, experience, and residual physical and mental capacities, without reference to employer hiring stipulations that might reduce the probability of his actually being hired to do *anything* almost to the vanishing point.

Second, the experience of the industrial psychologist in the Vocational Expert program has two related effects upon his relationships with his major employer:

a. he cannot help but become much more sophisticated with respect to the adaptability of impaired workers; and
b. he achieves a competence to argue effectively and forcefully for the propriety—indeed, the desirability—of adjusting hiring standards realistically to permit and encourage the utilization of the handicapped and the partially impaired.

Third, the industrial psychologist can make a major contribu-

tion to two key aspects of the general problem of placing the impaired worker:

a. the evaluation of worker capacity and potential; and
b. the determination of the physical and mental capacities requirements of jobs.

Fourth, participation in the Vocational Expert program imposes upon the industrial psychologist two major obligations:

The first is to do his homework. It is a disservice to both the BHA and the client to come to a hearing unprepared—and it could be embarrassing to the expert himself. Adequate preparation, furthermore, includes not only mastery and analysis of the case as it comes to the Vocational Expert through the mail in the collection of exhibits selected by the Hearing Examiner. The hearing itself,[5] sometimes to the dismay of the expert, brings out new facts, material that substantially alters the meaning of the contents of the exhibits (if, indeed, those contents are not completely refuted). The psychologist must be prepared with an apperceptive mass that renders him flexible enough to shift focus, reevaluate the claimant, and, on the basis of the new facts, suggest appropriate employment. It is, in my judgment, the poor expert who laments that because his written report, based on the exhibits, is rendered irrelevant by the hearing, he has somehow been done a disservice. The advice of President Truman applies here also: "If you can't stand the heat, stay out of the kitchen!" It would be pleasant that a final, definitive report could be written on the basis of the exhibits (with a little envy, perhaps, we must note that the medical profession does enjoy a situation somewhat like this in BHA hearings), but, if it were the case, there would be little point to the actual physical appearance of the Vocational Expert at the hearing. That very circumstance should warn even the most novice expert that his written report is only a tentative kind of document, which he should have the courage and information to jettison without a qualm.

The second obligation that the Vocational Expert program imposes upon the industrial psychologist, is that of professional objectivity and neutrality. He is at the hearing, even though paid by BHA, not in an adversary role, but as a friend of the court. He is as committed to serve the interests of the applicant as he is to serve the interests of the agency—exactly so much and not a little more in either direction. It is, unfortunately, easier to promulgate a doctrine of neutrality than it is to implement one. The expertise of the Hearing Examiner confronting the halting lack of sophistication of the claimant exercises strong, even if subtle, pressures

[5] Ash, P. Ibid p. 53.

on the observer. The examiner brings out flaws in the applicant's testimony, elicits admissions of physical activities not mentioned in the exhibits, and frequently gets the claimant to describe himself as much more of a "whole person" than the written record implied. It is in practice very difficult to maintain a completely neutral posture, to fail to be swayed by emphases which, perhaps, expert counsel in the claimant's corner could easily refute. The claimant is a small person petitioning for largesse from a grand and powerful institution—nothing less than the Government of the United States of America. It is, in my judgment, sometimes difficult to refrain from giving the government points merely for its munificence and generosity in bending backwards to merely entertain the petition against its previous determinations. The problem is exacerbated by a condition that must, in all candor, be faced when the "poor benighted claimant" appears without professional counsel: the industrial psychologist and the Hearing Examiner share an educational, social, economic, and philosophical culture—college graduates both, sophisticated both, members both of sedentary professions in which physical effort is unimportant so long as intellectual functions are unimpaired—which is alien to the culture of most of the claimants. They understand each other, and it is probable that their "understanding" of the applicant is based upon the same set of value judgments and stereotypes. The large majority of applicants come from a culture and background in which work is physical, not intellectual; education is limited to levels well below college; literacy and verbal facility is poorly developed. In the face of these enormous differences between applicant and expert on the other hand, and the multitudinous ties and sympathies between expert and examiner on the other, only with blindness could one assert that the goal of objectivity and neutrality is easily attained by the Vocational Expert. It is, therefore, essential that the psychologist, far from *assuming* that he is neutral, *actively* consider this issue and *consciously* guide his conduct accordingly.

The endurance of the Vocational Expert program for a decade may be taken as evidence of its political and social utility, its survival for another decade is predicated upon its adaptability to the changing circumstances and attitudes of our society. As the thrust of the social welfare state more and more insists that income to enjoy the beneficences of our material culture is a *right*, and not merely a privilege to be earned primarily through one's own work efforts, it is in my judgment inevitable that the criteria for eligibility for income continuance under conditions of partial disability will be, on the one hand, relaxed with respect to the extent of disability required before income without work will be

permitted, and on the other hand, increased in stringency with respect to the extent to which the probability of employment exists, given *both* content job requirements and contextual employer requirements. To meet effectively such probable changes, energetic prosecution of the inquiries outlined in this paper seem to me to be a matter of high urgency.

The Role of a Vocational Expert in the Social Security Administration's Bureau of Hearings and Appeals

Craig R. Colvin

Defined briefly, the responsibility of the Bureau of Hearings and Appeals is to examine, in a quasi-judicial fashion, all pertinent data relative to a claimant's previous denial of entitlement or a continuation of entitlement to disability benefits. Under the authority of a Hearing Examiner utilizing pre-established laws delineating his specific roles and functions, an impartial and fair hearing is conducted. This is done in an effort to gain insight as to whether or not the wage earner is, indeed, entitled to a finding of disability at a time relevant to possible entitlement to benefits. To aid the Hearing Examiner in the development of an objective and adequate record for a formal decision, a Vocational Expert may be called as a witness. Approximately 700 professionals function in the capacity of a Vocational Expert.

It is the intention of this writer to describe the Vocational Expert's role in the Bureau of Hearings and Appeals program as he understands it from the standpoint of a relative newcomer in this field. There has been limited material written regarding the formal position of the expert with the Social Security Administration (Feingold, 1969; Weiner, 1964; Rice 1961), but this writer would like to take an informal approach and describe specifically the initial involvement or interaction he has experienced with the Bureau. Other facets of program involvement will be discussed including the necessity and requirements for confidential and impartial testimony; the preparation of cases and how they might differ from when the Vocational Expert first entered the program; as well as some constructive suggestions how the Social Security Administration might better utilize the Vocational Expert in their dynamic young program. In order to maintain the informality of this article, the writer will make frequent use of the first person pronoun, since it will be necessary to make reference to particular techniques and methods utilized by him.

In the fall of 1969, I entered into contract with the Bureau of Hearings and Appeals as a Vocational Expert. Even though I signed an agreement stipulating I had a basic understanding of program administration and philosophy, I must truly say now that I had many apprehensions regarding my ultimate role as a Vocational Expert. I was confident that I could utilize my expertise gained as a vocational rehabilitation counselor and specifically my knowledge regarding the effective placement of handicapped people within the world of work. Most of these apprehensions devel-

oped from my naivete toward the Social Security program itself. As an example, I understood after reading the contract that I would not be held accountable for decisions or anything considered a part of the decision making process; my role was to provide only testimony. I am sure that many newly employed Vocational Experts have a compulsion to make decisions surrounding the wage earner's capability of performing work even though the Hearing Examiner, or the Appeals Council, has this sole responsibility. I find myself, even to this day, having to reflect back on the Administration's intention concerning my participation as an expert in hearings.

Since my first testimony in 1969, I have been briefed repeatedly that my testimony was to be unbiased. For the benefit of the claimant and/or his representative the Hearing Examiner stresses for the record the fact that I am an impartial witness, representing neither the Federal government nor the claimant. With each new hearing, the Hearing Examiner states that my role is to provide information specific to the claimant's functional ability to perform work. Basic assumptions are provided the Vocational Expert in accord with the claimant's functional limitations (impairment) viewed in relation to his past work experience, age, education, and other factors deemed important by the Hearing Examiner. At this point the Hearing Examiners in my area usually reiterate their opening statement regarding the importance of impartial testimony.

Case Preparation

It is interesting to note how my case preparation has changed from my initial involvement with the Bureau of Hearings and Appeals and how a case is now prepared. After receiving the exhibits sent to me by the hearing examiner which he feels are pertinent to this particular case, I read them over carefully and take some notes. The format used in my initial case preparation follows; this information is written on a standard legal pad (as I read through the exhibits I make specific comments in the respective category).

Most of the categories described on the case history sheet are self-explanatory; yet some of them need further clarification. The *Address* is included because this gives the expert an idea of the claimant's area of residence (immediately I begin assessing the existence of suitable jobs he might be able to perform within this area). Realizing, of course, that the Federal guidelines have established that the local as well as the national economy should be considered in the development of disability cases, this writer argues that it is imperative the claimant's specific geographic area

Name:
Address:
Marital Status:
Age (Date of Birth):
Education:
Military History:
Alleged Disability:

Medical History:

Current Diagnosis and Prognosis:

Work History (Date, Name of Company, Specific Job Title, Duties):

Testimony Based on Period Covering:

Date and Location of Hearing:

How Did W/E Get to Hearing?

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of residence be considered if we are to be more persuasive in appraising a claimant's ability to perform substantial gainful activity.

Another vital bit of information found in the case folder is the wage earner's *Date of Birth.* A Vocational Expert cannot give adequate testimony without having the claimant's age as well as his level of educational achievement. Most jobs available in today's labor market require a designated educational level before an individual is eligible for employment. I also include *Military History* since this often gives information regarding an individual's Military Occupational Specialty (MOS) or his involvement in other aspects of the world of work.

As per the transmittal letter sent to me along with the exhibits, it is required of the Vocational Expert to base his testimony on that period of time relevant to the claimant's claim for disability benefits as established by the Bureau of Hearings and Appeals in conjunction with the claimant's initial request for a hearing. Therefore, I include on my worksheet, *Testimony Based on Period Covering*:

So that I might maintain adequate records, I add the *Date* and the *Location of Hearing* for this specific claimant. Since I now have visited most of the locations in which hearings are held, I no

longer need to identify the specific building or address, but only the town in which the meeting will be conducted. Also included here is the exact time that the hearing will be held in the course of a day.

The next bit of information—*How Did Wage Earner Get to Hearing*—is left blank during the expert's initial case preparation; obviously this information is filled in during the actual hearing with the claimant. When he is developing his impartial testimony, it is imperative for the Vocational Expert to use as much intuitive information as possible, one being how did the claimant get to this hearing? If he drove, this implies that he has more functional capacity than might otherwise be expected, since driving is considered rather strenuous and it definitely requires dexterity, eye-hand-foot coordination, and the ability to make quick decisions. Such an observation might otherwise be overlooked not only by the Hearing Examiners, but by the Vocational Expert or other witnesses testifying on behalf of the claimant. And yet, if we are to gather as much pertinent information on behalf of the claimant as possible, it is necessary to utilize every available source. As an example, if a client has been driving prior to the onset of his problem, but now was unable to get to this particular hearing on his own and had to require the assistance of others, a note should be made to this effect within the space provided on the worksheet.

This Vocational Expert also includes the claimant's *Alleged Impairment*. It is important for the Vocational Expert to examine what the claimant feels is wrong with himself, not only from what he has told a Social Security interviewer (in the exhibits provided by the Hearing Examiner), but also from his testimony actually presented during the hearing.

Following the *Alleged Impairment*, it is important to include the actual *Medical History* as developed and recorded by practicing physicians. Included within this category I make note of various operations and the date each were performed; specific medical problems related to the alleged impairment; prescribed medications taken by claimant in order to relieve or partially reduce pain; and any other comments the physician might explicitly or implicitly relate directly to the claimant's medical problem.

Even though the following category—*Current Diagnosis and Prognosis*—is a part of the medical history, I separated it so that I may speedily refer to it at any given time during my case preparation and during the actual hearing.

The expert can begin specifically to focalize on the problem related to the present claim rather than some problem that may

have existed 10, 15, or more years ago and which now is not causing him problems *per se*.

The final category used in developing the case is that of a *Work History*. Within this area I try to find and list from the exhibits the name of the company for which he worked, his specific job title and duties that he performed in his daily activities as well as the beginning and terminating dates of employment with the organization. Of course, if he has worked for more than one company, they are listed in chronological order from most recent employment to his first job. The work history is a crucial area that should concern the Vocational Expert. It is because of this factor regarding work history and vocational potential that the expert has signed a contract with the Social Security Administration; i.e., the ability of the expert to examine the client's work history in terms of age, education, and medical information in order to determine jobs suitable under whatever residual capacity the Hearing Examiner defines in his assumptions.

After the initial development of the wage earner's case, I carefully read each exhibit again looking for items that I might have missed during the initial preparation. As soon as I have finished perusing the folder it is returned immediately to the Hearing Examiner's office. Unless unforeseen problems develop, I try to do my case recording and initial folder evaluation within 24 hours after receiving it.

Up to this point my case preparation does not differ significantly from when I first began in the program other than I no longer feel compelled to take copious notes. Since my first several hearings I have learned that a Vocational Expert can glean much information from the face-to-face confrontation with the claimant; such information can be used effectively *in conjunction* with the exhibits derived from the case folder.

After returning the claimant's folder to the Hearing Examiner, the actual hard work of the Vocational Expert begins. It is at this point that occupational information and job analyses be performed. In developing my testimony, I rely solely on a variety of companies located within a specified geographical region surrounding the claimant's home. If the Social Security program continues to consider itself realistic and viable, it must allow the Vocational Expert to examine jobs primarily within the specific region in which the claimant lives, rather than citing jobs that may be in existence hundreds, or even thousands of miles away from his residence. Such testimony also increases the validity of the Vocational Expert's comments by not relying on information possibly derived from other secondary sources within other states or geographic regions that he personally has not evaluated.

One of the first steps I take in the development of occupational material within the locale is to contact the Chamber of Commerce serving the area in which the claimant resides. From this community representative I accumulate information of the following nature:

1. the names of specific organizations (ranging from small businesses to giant corporations) found within the area in question;
2. the address of the organization;
3. the name of the employment manager, plant manager and some other representative that I may call by name rather than merely relying on the switchboard operator;
4. the company's primary product(s) and a brief description of the commodity if it is not readily identifiable (e.g., polypropolene fibers and films—used for industrial wrapping, etc.);
5. the approximate number of people working in the plant or company complex within this specific area;
6. any other information which the Chamber of Commerce representative might think helpful (e.g., home office address if local plant is a subsidiary of another company, etc.).

With the Chamber of Commerce as well as with the other organizations or individuals contacted in the development of my testimony, I *always* explain my position with the Social Security Administration as a Vocational Expert and the underlying rationale supporting the program's existence. I think that all Vocational Experts are, or should be, considered as public relations representatives of the Administration, even though we are gathering material for unbiased testimony. Thus far in my contacts with various organizations I have been shunned by only one company when it came to gathering information about businesses and specific jobs within the community. Their prime reason for not permitting me to interview them was they felt the parent company located within another state would not allow the divulgence of "confidential" information such as types of jobs, approximate number of people performing these jobs and their industrial classification regarding physical demands, educational level required for adequate job performance and the like.

After my initial involvement with the local Chamber of Commerce, I then call upon the district office of the State Employment Commission serving that locale. When talking to the manager or one of the counselors serving the claimant's area, I relate to him as I did with the Chamber of Commerce my reason for contacting the employment office and also the type of pertinent information that was derived previously from the Chamber of Commerce. If possible, I provide him with one or two references he may wish to

contact verifying the authenticity of my requests, as well as my credentials. The employment office manager is assured that the information derived from our conversation will be held in confidence as per the responsibilities of my position as a Vocational Expert.

I then proceed by telling him that it is necessary to use information supplied to me in a hearing requested on behalf of an individual who has been denied disability benefits; usually after giving him this information he is more than willing to give me whatever material I deem as necessary. Even though most employment office managers are aware to some degree of the Bureau of Hearings and Appeals program, their specific responsibility in aiding Vocational Experts in compiling occupationally significant material must sometimes be reviewed. I use the transmittal letter (Training and Employment Service Program Letter No. 2686, October 1971) sent to all state employment agencies regarding their assistance in determining eligibility of disability claimants and the inclusion of appropriate job information. Tactfully employed, this letter affords the Vocational Expert the opportunity to gain the manager's confidence so that he no longer feels threatened by your presence, inquisitiveness, or intrusion into his office setting. The letter, therefore, acts both as an "introducer" and as a "describer" of responsibilities for Vocational Experts and state employment offices.

The material derived from the Chamber of Commerce is used as an initial source of information. In turn, he is asked to more or less fill in the gaps that the Chamber of Commerce was unable to provide; e.g., specific job titles within various companies that normally are considered sedentary, light, moderate, and in a few instances, heavy, in relation to physical demands (as standardized by the *D.O.T.*). Additionally, if it is possible, to provide approximate numbers of people employed within these specific job titles.

Even though it is not the Vocational Expert's responsibility to comment on availability of jobs, i.e., job openings per se, this expert feels it is imperative that he gather as much information on labor market trends for the geographic area as possible. As an example, I have had the occasion in the last year to make vocational surveys within a specific region of my state. Upon interviewing the local employment office manager, it was discovered that due to lost government contracts and various other forms of economic depression, the labor market had dropped more than 50 per cent. Many companies employing 200 or more workers were then down to a mere 10 or 15 employees.

Following my contact with the state employment office, I then proceed directly to various industries found within the claimant's

area of residence. I try to select representative organizations found within the industrial community rather than relying on, for example, all furniture manufacturers or all small electronic component companies. By gathering a cross section of the industry available in the area, a Vocational Expert and, in turn, the Hearing Examiner, is in a much better position to determine the feasibility of transferring vocational skills from one job into another.

Vocational surveys are performed with two purposes in mind:

1. The development of an occupational information file with additional material being added continually as my length of service with the Bureau increases. This enables me to rely on previously completed vocational surveys in the preparation of future cases directed to me by the Hearing Examiner.
2. Individual claimants are kept in mind in regard to potential job opportunities within specific businesses surveyed. Either way, it is essential for the Vocational Expert to gather appropriate information when he is actually within the plant he has chosen to examine.

It is suggested unequivocally that the expert establish rapport with a contact person within the organization such as the employment manager or someone dealing with public relations. On several occasions my initial contact has been with the president of the organization (admittedly this is a rare occurrence, but in some small companies this is the prime contact). In establishing rapport the Vocational Expert should explain specifically the nature of his business; i.e., define your relationship as a Vocational Expert with the Social Security Administration's Bureau of Hearings and Appeals; assure him that you are not there as a representative of the Federal government to investigate him; assure him that information derived will not be used to evaluate his hiring practices in relation to age, sex, race or religion, as well as his hiring practices regarding handicapped people; assure him that information derived will be used as supplementary material presented to a representative of the Social Security Administration in an attempt to justify the provision of disability benefits or the denial of such benefits to a claimant.

When contacts are now made with the employment manager of a company, I try to convince him that he need not provide me with information which may violate company policy. I continue by telling him that even though he is providing me with titles of jobs and the approximate number of such jobs within his organization, neither the Social Security Administration representatives nor the claimant himself will be knocking on the company door for further clarification of information given the Vocational Expert or for a job, respectively.

The existence or non-existence of jobs does not concern me (as far as my testimony goes), nor does his hiring practices, or any other factors relevant to the Civil Rights Act of 1964.

The information I strive to receive in any of my vocational surveys follows the guidelines suggested by the Bureau as being relevant. They are as follows:

1. the name, address and nature of a business and their total employment;
2. the date and method of contact;
3. the responsible official interviewed, identified by name and title;
4. the type of light and sedentary jobs performed in the establishment by actual job title and code number if possible (I also find some jobs at the medium and heavy level to round out my survey and make it more realistic in view of the labor market situation in this country today);
5. the actual number of such jobs, whether filled or unfilled;
6. a description of the tasks performed in each job as it exists in that particular facility;
7. the physical demands of each job as found in that organization such as sitting; standing; bending; lifting; approximate amount of weight lifted and its frequency; limbs required; visual acuity; and other factors relative to job performance;
8. the working conditions surrounding each job such as heat, humidity, lighting, noise, vibration, toxic, chemicals, etc;
9. other occupationally significant characteristics related to the performance of each job, such as intelligence, memory, precision, finger dexterity, eye-hand coordination, etc.

Also included in my report whether it be for the accumulation of occupationally significant information or specifically in the preparation of a case which is about to be heard by the Hearing Examiner—is the percentage of time spent sitting on each job throughout a normal work day and whether or not a job can be performed by an individual with a single upper extremity (limb).

The Utilization of Occupational Information

Thus far in my limited experience with the Bureau of Hearings and Appeals as a Vocational Expert, I have heard other experts talk about their use of the *Dictionary of Occupational Titles* (*DOT*). My testimony differs quite markedly today than when I began the program several years ago; I now use the DOT rather than talk about it. There is a wealth of information the Vocational Expert can derive from *Volume II* regarding the transferability of skills found within various occupations in which claimants have worked in the past.

A point I do not necessarily agree with that I have heard from various experts is that they use the DOT as the foundation of their testimony. I disagree that this is the best utilization of the DOT by the Vocational Expert. I contend that it is to be used for transferability of skills only and that footwork should be done in the claimant's area of residence within specific industries for determining existence and numbers of appropriate jobs, usually of a sedentary and light nature. How else can an expert testify regarding the vocational capability of an individual without examining firsthand working conditions within specific settings?

I will say that after a vocational survey has been completed within a company, I try to standardize my information using the DOT; i.e., the DOT code number is used if one is available. If not, I assign my own number utilizing the method described in the introduction to *Volume II*. Also the physical demands, working environment, general educational development level (GED), specific vocational preparation (SVP), etc. are derived not from the DOT, but from the actual job situation.

After the survey has been performed this material is correlated with information found within the DOT. This is done for obvious reasons: the standardization of occupational information is a necessary component of our program. And yet, if a Vocational Expert relies entirely on the DOT to supply him with testimonial information, I seriously doubt his competence and his ability to provide meaningful input to the Bureau of Hearings and Appeals' program. Speaking honestly, I must admit that this is exactly the way I prepared my first case. It did not take long, however, to realize that such a preparation was shallow, inadequate, and rather meaningless. The first several cases in which I testified were taxing to my conscience when I now reflect back on my case preparation, especially when I consider that I was being paid to perform a vital service for the claimant and the Bureau. Professional growth has helped me overcome these early inadequacies.

Another source of information used in the derivation of occupationally significant material is the Labor Market Trends compiled by most state departments of employment security. Usually they break the state down into several regions and then depict occupational trends as they have developed during each quarter of the year. Such an analysis might include agricultural versus non-agricultural jobs and their approximate number and rough estimates of the people needed to perform various jobs, such as in mining, manufacturing, retailing, transportation, public service and the like. Again, the Vocational Expert can use this for background information in case he is questioned not only by the Hearing

Examiner and the claimant, but possibly by the claimant's representative during the testimony.

In my frequent traveling around the state and specifically when I am visiting areas where I have appeared in the past, I obtain a newspaper and investigate the want-ad sections. This way I can see what types of jobs are open that claimants might be able to perform as well as the opportunity to evaluate employee turn-over rates within various companies. The want-ads also can show the addition of new companies to the local region as well as their employment needs. By keeping abreast of the labor market via the local newspapers, I can then plan accordingly to make more visitations in that area either during that particular trip or when I am called upon to testify for the Bureau regarding a case in the future.

Again, I try to use whatever resource I can to supplement my testimony preparation; as an example, I recently visited a paper mill in the area. During my conversation with the company's public relations man he mentioned that the company had a subsidiary making boxes in another section of the state where I have also testified as a Vocational Expert. He gave me the name of the organization and a representative that I would be able to contact during one of my visitations. One can readily see that this is one way of getting your "foot in the door"; i.e., I am now able to mention by name the public relations representative at the first plant visited, thereby implying I have been "approved" by them.

The yellow pages of local telephone directories make an excellent source of occupational information for Vocational Experts. Whenever I go through a town in which I may be asked to testify in the future, I stop by the telephone office and pick up a local directory serving that geographic region. Casually thumbing through the yellow pages one soon begins to visualize the various and sundry businesses that have established themselves in this area. Obviously the Vocational Expert can use the yellow pages to get the name of the company, their address and their telephone number so that when he returns home, a call can be placed to the respective organization for further information.

A Vocational Expert should visit and tour work adjustment facilities such as sheltered workshops and comprehensive rehabilitation centers. Here one can examine the techniques used in developing job skills for handicapped individuals. Much can be learned about the world of work in these field visitations as well as the transferability of occupations from one work setting to another.

A Vocational Expert also should concern himself with the cases he has previously developed for the Bureau of Hearings and Appeals; this material can aid the Vocational Expert in his appraisal

of job opportunities for later testimony regarding clients living within their area.

Although some of the information obtained through these devices may not be utilized in a particular case, and in some instances may be of doubtful relevance, nonetheless they contribute to my knowledge and give me a greater assurance of my capacity to perform properly as an expert witness.

Possible Suggestions for the Improvement of the Vocational Expert Program

In the initial letter received regarding my contribution to this monograph, I was asked to comment on methods of improving the role of the Vocational Expert which could be considered administratively feasible. As each Vocational Expert participates in more cases he soon begins to think about ways in which the program could be enhanced. Fortunately, I have been given this opportunity to express my feelings and the feasibility of enacting new methods to improve our service.

1. Possibly one of the most important things to be considered in this vital program is the free communication that should exist between a Vocational Expert and the Hearing Examiner. It is realized by this expert, that prior communication regarding a claimant's case history and other related legal matters should not be discussed. This does not negate the possibility of securing additional information *after* the termination of the hearing by the examiner.

   I personally attribute my professional growth and development with the Bureau of Hearings and Appeals to the conscientiousness of the Hearing Examiner; he has provided me meaningful feedback in relation to testimony that was just submitted regarding a particular client. When I first began in the program I asked the Hearing Examiner and his assistant how I performed in relation to other Vocational Experts they have had the privilege of utilizing beforehand. Additionally, their comments are welcomed regarding recommendations they feel are imperative for my professional growth with the organization. They have taken time to explain to me that I have made some mistakes. For example, when I began my services with the Bureau, I was notoriously "backing up in a corner" when confronted by the claimant's attorney. The problem could have been avoided rather easily by gathering more specific information on a particular job cited by me or just listening to what the claimant had to say during his testimony. It is feedback similar to this that enables the vocational expert to use his past experience for the benefit of future testimony.

2. All too often I have been unable to read the majority of exhibits provided me in the case folder. There seems to be a lackadaisical attitude existing within some Social Security offices. Some arrangements should be made to get this material transcribed so that any responsible person reading the case can understand what has transpired.
3. Under the present procedure the personnel of Social Security district offices are primarily responsible for developing the factual background of the claimant, including his vocational experience.

   Time and time again after examining the exhibits sent to me by the Hearing Examiner, I have found that Social Security Administration's interviewer has failed to develop the claimant's past job history adequately. If the Vocational Expert is expected to develop sound and unbiased testimony, it is imperative that the exhibits include a thoroughly completed disability interview sheet (Form SSA–401) with all identifying information completed and recorded accurately.

   Since my involvement in the program this development has not improved. As a result, the expert as well as the Hearing Examiner is not fully aware of what the claimant has experienced vocationally until it is developed at the hearing. This, in many cases, would affect the expert's case preparation; the examiner might not find it necessary to require the services of a Vocational Expert at all if adequate material were derived during the initial interview.
4. Thus far in my limited experience with the Bureau of Hearings and Appeals, I have noticed that some of the places where hearings are held have much to be desired. It is realized that the procurement of adequate facilities is sometimes difficult, but when a meeting room is not conducive to a smooth and easily understood hearing, all is for naught. Thus far I have attended hearings in old court houses where every sound uttered from the Hearing Examiner, his assistant, the claimant, his attorney, the medical advisor and the Vocational Expert literally echoes from wall to wall; other hearing rooms have been either too hot or too cold; or the room has been so situated that others using the building must constantly interrupt the hearing in order to get from one side of the building to another.

   The selection of meeting places should be done carefully in order to take into account the items mentioned above, as well as architectural barriers that may prohibit claimants and/or their witnesses and family from attending the hearing. Archi-

tectural barriers should be examined such as steps, elevators, narrow doorways, parking facilities, and the like.

5. Another suggestion would be that more training programs be made available for Vocational Experts regarding specific problems that arise in the field. I was under the impression when I heard about the program that periodic training would be made available to experts; yet as of this date, I have attended only one meeting which was concerned primarily with policy, rather than procedure.

   A possibility for topics could be centered around the effective use of vocational surveys; the standardization of format in testimony preparation; a discussion of the types of jobs available with specific disability categories such as Black Lung, back disabilities, arthritis, amputation, Buerger's disease, Raynaud's disease, heart disorders, and a multitude of other disabilities; and an analysis of the labor market and how it affects the Vocational Expert's testimony.

6. Newly employed Vocational Experts should be advised that the utilization of the DOT should be confined to developing job definitions, examining physical demands of jobs and their transferability to other areas of work. Actual information derived from plant visitations should be the basis of the expert's testimony for numbers of appropriate jobs in the economy.

7. In order to avoid any possible confusion, new Vocational Experts should be advised at the outset that there is a difference between *employability* and the *placeability* of a claimant. A worker is employable if he is physically and mentally equipped to perform a job as defined by the expert. Placeability, on the other hand, involves the availability of that job in the labor market. In the Social Security laws, the expert's role is defined as being concerned primarily with the employability of the claimant, rather than his placeability. Therefore, in discussing the competencies needed by Vocational Experts, emphasis should be placed on proficiency in evaluating employability. As one of his primary responsibilities, the Vocational Expert must be prepared to make a definitive statement on this aspect of his testimony.

8. A Vocational Expert's knowledge of medical information is essential even though medical decisions are not directly within the realm of his responsibilities. As indicated by the Social Security Administration, it is imperative the expert remain within his field of competence. Yet, if we are to testify objectively and impartially, it is necessary for the Vocational Expert to have some foundations of medical aspects and their resultant influence on claimants. With this in mind every Vo-

cational Expert should be provided examples of medical problems which have been examined in the past by the Administration as well as various in-service training material depicting disabilities in relation to a claimant's work potential.

It is recommended that physicians filling out reports for the Social Security Administration also include a "Physical Capacities Analysis Form." In several of my cases during the last year I have had the occasion to read and interpret this form completed by a physician. The material derived from the physician's contact with the claimant directly translates the physician's physical findings into occupationally significant terms, the Hearing Examiner, the Vocational Expert and even the claimant can understand and comprehend.

Reflections

Probably my greatest concern after joining the program as an expert dealt with my expectations of actual involvement in case decisions. There was this incessant urge to provide the Hearing Examiner feedback specifically related to *his* decision-making process. It took some time before I realized that this was not my responsibility, and I was in attendance primarily to provide vocational testimony relevant to the Hearing Examiner's basic assumption(s) regarding the client's limitations and functional potential.

Another area of vital concern at the outset of my experience was my relationship vis-a-vis a lawyer for the claimant. During those first few sessions, I was somewhat fearful of this interrogation atmosphere (i.e., his questioning techniques) surrounding a lawyer. It did not take long to realize that if my testimony was prepared adequately regarding vocational possibilities for the claimant, I had "nothing to fear but fear itself." A major part of the problem exists in this respect when the new expert forgets that he is an unbiased witness; participating, neither on behalf of the client nor the Federal government. One tends to forget this role when confronted by an articulate attorney accusing you of not examining all possible variables in relation to his client's residual limitations. Once a newly employed Vocational Expert can accept the fact that perceptive interrogation by an attorney is something which will frequently occur, the expert will be in a much better position to remain calm and in control of his testimony. But, by the same token the expert must consider and objectively evaluate the assumptions proposed by an attorney; in fact, if he has done his "homework" he can answer their questions with the feelings of an expert witness who knows his business.

During the last several years I have become increasingly aware that no matter how much note-taking a Vocational Expert might employ when examining the exhibits sent to him by the Hearing Examiner, there is no way to 'get the feel" of the claimant and his problems until one actually sees him and listens to his testimony at the hearing. The utilization of selective observation is essential if the expert is desirous of giving truly objective testimony. Often I have thought to myself after reading the exhibits that the individual was incapable of performing any type of substantial gainful activity within the labor market (even though I realize this is not my responsibility to make decisions, I must admit this is a natural tendency which must be combatted by me even to this day). Yet when I finally confront the claimant at the hearing, I usually redirect my thought processes to include the most important exhibit of all—the claimant himself.

The Vocational Expert should have the expertise to evaluate and, in some cases, read "between the lines" of the exhibits. By this it is meant an expert must have the ability to examine objectively the exhibits and the claimant, plus all testimony developed at the hearing without interjecting sympathetic or empathic feelings which only compound the enormous problem at hand.

The newly employed expert as well as anyone working with handicapped people should be aware that some claimants have mastered the art of manipulation and after listening to some of these people they can have you literally "eating out of their hands." This is one reason why it is so important to visually examine the claimant's mannerisms, gestures, speaking ability, references to his problems and his past vocational experience, his social background and even the comments made by the claimant's spouse. All of these variables combined will enable the Vocational Expert to give unbiased testimony predicated upon the variable assumptions proposed by the Hearing Examiner, or ask the latter for any needed relevant elaboration.

In conclusion, this Vocational Expert realizes the importance of his role to the Bureau of Hearings and Appeals. The opportunity afforded me to grow personally and professionally cannot be evaluated in this brief monograph. Possibly one point which stands out in my mind is that in every case in which I have been involved, the Hearing Examiner explicitly states for the record a fair and impartial hearing will be held where the claimant may say anything he wishes to support his request for disability benefits. To me this is the essence and the strength of the program. Additionally, the utilization of Medical and Vocational Experts is further testimony substantiating the desires of the Administration

to provide the claimant every opportunity to be heard under the guidance of a concerned and dedicated staff.

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Chapter V

Judicial Experience

Alvin Orlowek

Because it was judicial fiat that was responsible for the Social Security Administration seeking the expertise of individuals who would furnish vocational evidence, a chapter on judicial reaction to the Vocational Expert program is entirely appropriate in this monograph. Moreover, judicial experience has been almost wholly responsible for the substantive and procedural changes in Vocational Expert testimony which have taken place over the past 10 years, e.g., such concepts as having Vocational Experts rely more on personal knowledge and less on textual material as a basis for their testimony, developing their expertise further, changes in the content of the hypothetical assumptions, etc.

It can be stated without fear of contradiction that all of the Federal Courts have, either tacitly or explicitly, accepted Vocational Expert testimony as accomplishing the purpose for which it is utilized. This applies to courts at all levels, including the U. S. Supreme Court (*Richardson v. Perales*, S.Ct,1420). Indeed the majority of courts believe, that from a purely legal standpoint, Vocational Expert testimony is the best type of vocational evidence that can be obtained. There are several reasons for this.

First, the Vocational Expert is impartial, a fact that is recognized by the courts who have noted the manner of selection as well as the content of testimony. Many court decisions have expressly commented on the fact that Vocational Experts under contract to the Department of Health, Education, and Welfare have no axe to grind, are not concerned with the outcome of the case, and for this reason may be of greater assistance to the adjudicator than are Vocational Experts requested to testify on behalf of claimants (Cf *Kyle v. Richardson*, CCH 16,424 CA–4, 1971). (See Exhibit 1, page 98.)

Secondly, the Vocational Expert brings to the hearing an expertise which uniquely qualifies him for his role, being a combination of knowledge of the world of work, a familiarity with problems of handicapped individuals in our society, and an ability to understand medical terminology (although he is neither expected nor required to independently evaluate medical evidence). Occasionally, courts have commented on another expertise which many Social Security Administration Vocational Experts possess, namely, the capacity to comment on psychological factors insofar as they affect ability to function occupationally (Cf *Waters v. Gardner*, CCH 16,499D, CA–9, 1972).

Finally, the Vocational Expert, being a "live" witness, subjects his testimony to the searching inquiry which results from cross-examination by claimants or their representatives. The right of cross-examination, as many Vocational Experts are aware, is more than just theoretical. This elevates such testimony to a far greater level of "substantiality" than written material, such as that formerly relied upon as a basis for vocational findings. You cannot cross-examine a document. It is this feature that has caused many courts to take the position that only live Vocational Expert testimony can constitute substantial evidence to support a decision adverse to a disability claimant.

In addition to recognizing the efficacy of the technique itself as well as the content of their testimony, the courts, with few exceptions, have given due recognition to the professional qualifications of Vocational Experts, their expertise in their chosen field, and their competence to testify at our hearings. While, on occasion, some courts have questioned the competence or qualifications of a Vocational Expert, the same courts have on other occasions specifically accepted both the competence and the content of the testimony of these same experts. Inconsistencies of this type are not unusual in the judicial field where opinions are frequently rationalized to achieve what is considered to be a correct result.

However, Vocational Expert testimony has not been immune from judicial criticism. Although such criticism is not uncommon, it has proven to be constructive in that the Department has learned to minimize the areas where the criticisms have been general and avoidable.

This is particularly true if the specific criticism is widespread or recurrent. Unfortunately, perhaps because the program is relatively new and court experience limited, or because the courts may not yet fully understand the role of the Vocational Expert, a situation sometimes arises where some courts criticize and refuse to accept a given type of testimony, while others praise and consider the same type as a "sine qua non" for judicial approval. This has tended to maximize confusion and minimize the guidance which the courts should provide. An excellent example of this is the difference among the courts on the issue of whether Vocational Expert testimony should be based on the expert's independent medical assumptions or on hypothetical assumptions presented by the Hearing Examiner.

Before discussing judicial experience on a judicial circuit by circuit basis, it should be noted that Vocational Expert testimony is only one of several evidentiary elements which the adjudicator must consider in reaching his decision. As such, it may or may not

be in harmony with some, or all, of the other evidence. Thus, when in a given case, a court comments either favorably or adversely on Vocational Expert testimony, it is in the context of the total evidentiary picture and the reaction of the court may be dependent on factors beyond such testimony.

The discussion will contain frequent references to the decision in *Kerner v. Flemming* (283 F. 2d 916) and its two-part test. The first part relates to the showing of what other jobs a claimant can do, while the second part refers to the existence of such job opportunities in the national economy.

The United States Court of Appeals for the First Circuit

This circuit includes the states of Maine, Massachusetts, New Hampshire, Puerto Rico, and Rhode Island. This Court of Appeals has affirmed every case in which a Vocational Expert has testified. Until recently, it generally did not comment directly on Vocational Expert testimony, but the broad language of its decisions suggests that they look upon it as satisfying the Secretary's burden of proof. Recently, this court rendered a unique decision in which it held that the Vocational Expert testimony could properly be relied upon to establish a closed period of disability, and since the testimony took place on the date of the hearing, the Hearing Examiner properly found that to be the date on which claimant was no longer disabled!

The Federal District Courts in both Maine and Massachusetts have affirmed the Secretary in every instance where a Vocational Expert has testified. They have consistently adhered to the 1967 Amendments to hold that Vocational Experts need not testify as to job vacancy or ability to be hired, and have taken judicial notice that the jobs selected are so well known that they can be presumed to exist in significant numbers in the New England region. They have commented favorably on the content of hypotheticals, and look with special favor on testimony based on personal knowledge of job existence.

The only other court in the First Circuit which has provided any guidance on Vocational Expert testimony is the District Court of Puerto Rico. This court adheres strictly to the view that nothing less than live Vocational Expert testimony is acceptable as proof that occupationally-impaired claimants can engage in substantial gainful activity. It has, in almost every instance, accepted the Vocational Expert testimony, and on several occasions has made extremely favorable comments on both the content of testimony and the qualifications of the expert. It often notes the Vocational Experts' ability to understand medical evidence. It has held that Vocational Expert testimony is both admissible and substan-

tial, since the expert is subject to cross-examination. It has also held that the fact that they are paid by the Government neither compromises their impartiality nor diminishes the value of their testimony in assisting the Hearing Examiner to reach a proper decision. It often comments on the fact that the jobs suggested by the Vocational Expert are consistent with the functional limitations reported by the physicians, and observes that the Vocational Experts fully explain the duties and physical demands of the jobs. Moreover, the general feeling is that Vocational Expert testimony should be based essentially on the "objective" medical findings with lesser emphasis on subjective symptoms. The court has reversed the Secretary in only two cases, both prior to enactment of the 1967 Amendments; one because the Vocational Expert had failed to test the claimant or study his aptitude for the jobs suggested, and the other because he failed to state whether the claimant could be hired.

The United States Court of Appeals for the Second Circuit

This circuit includes the states of New York, Connecticut, and Vermont. This is the Circuit Court which rendered the *Kerner* decision. Its approval of Vocational Expert testimony is best expressed in the second *Kerner* decision where it stated that if such testimony had been introduced before *Kerner* sought judicial review, the Secretary's decision would have been "legally unassailable." In subsequent decisions it has held: that Vocational Expert testimony can be relied upon to deny a claim based on allegations of pain, where the expert testified that even assuming such pain the claimant could perform certain jobs; that Vocational Experts may rely on the Dictionary of Occupational Titles; and that the expert need not address himself to job vacancies. Both the Circuit and District Courts have tended to emphasize the need for better testimony on the first part of the *Kerner* test, and unlike other courts, have indicated little concern over testimony on the second part. This is probably due to the fact that most claimants live in a large metropolitan area where all types of jobs exist in substantial numbers.

The two New York City courts (Eastern and Southern Districts of New York) have been highly critical of Vocational Expert testimony where such is based on the expert's own evaluation of the medical evidence, i.e., where hypotheticals are either not given; where hypotheticals do not offer varying levels of severity, or do not consider subjective symptoms or do not consider the effect of "psychogenic" factors or ability to function. At least one court has rejected Vocational Expert testimony because he did not

state if the claimants could "fairly compete" with healthy individuals of similar age, education and work experience. On several occasions, these courts have described Vocational Expert testimony as "rather generalized" or "somewhat theoretical," because they did not appear to relate their testimony to the individual claimant's situations. On the other hand, these courts have held that it is not improper for the Hearing Examiner to decide in advance which medical evidence will be relied upon to form the basis for the hypotheticals. They have also affirmed decisions where the Vocational Expert's testimony was based on hypotheticals which took into account varying levels of severity of impairments. Use of the Dictionary of Occupational Titles has also been accepted as a source of job descriptions, physical demands, etc.

The United States Court of Appeals for the Third Circuit

This Circuit includes the states of Delaware, New Jersey, and Pennsylvania. This Circuit Court has been as responsible as any for the expansion of the Vocational Expert program. This resulted from its rejection in several early decisions of textual material as proof that there were suitable jobs for individuals with specific impairments. The court found that this material was too conjectural and did not relate to individual claimants and their impairments, age, education and vocational background. It therefore required "personalized" vocational evidence or testimony. Thus, the Department felt compelled to make greater use of Vocational Experts in this jurisdiction. However, in a pre-1967 Amendment decision, the court rejected vocational expert testimony because the expert relied on the Dictionary of Occupational Titles and because he did not testify as to whether the claimant had a reasonable opportunity to find a job in his local community. Four years elapsed before the court abandoned the local availability criteria, stating in a 1970 decision that the plain language of the 1967 Amendments clearly overruled any necessity for the Vocational Expert to testify that a claimant could be hired or that suitable employment existed in the local area. The court suggested that the law was not consistent with the realities of the world of work and called it "very harsh," but nevertheless indicated that it was bound to abide by the mandate of Congress. This court has been the first to specifically require testimony on the numbers of jobs in existence, holding that the failure to do so will be considered reversible error. It is also the first circuit court to indicate that Vocational Experts need not have exact knowledge of medical terms, nor interview claimants prior to hearings in order for their testimony to be given due weight.

The experience in the Delaware District Court illustrates how different factual situations can cause the same court, within a matter of a few weeks, to reach different conclusions vis-a-vis Vocational Expert testimony. In one instance, Vocational Expert testimony was rejected because the testimony regarding claimant's ability to do specific jobs was based on "general observation" of job performance and therefore not on any real "expertise," and because his testimony on job availability was based on newspaper ads. Later, the court approved Vocational Expert testimony based on newspaper ad information in "New York and New Jersey" (the Vocational Expert was from Newark, New Jersey and had come to Delaware only to testify at the hearing).

Perhaps no courts in the Third Circuit (or the entire country) have been more responsible for specific criticisms of Vocational Expert testimony than the courts in the three Federal Districts in Pennsylvania. One Vocational Expert was described as unqualified to testify in any of our cases because he was a guidance counselor to high school students "none of whom suffer any occupational disability." Another Vocational Expert's failure to "analyze" all of the medical evidence was held to be a basis for rejecting his testimony. Vocational testimony has also been rejected because of: exclusive reliance on the Dictionary of Occupational Titles; an independent evaluation by the expert of the medical evidence; failure to state whether employers would hire a claimant; failure to state whether jobs suitable for claimants existed in a particular geographical area; failure to contact United States Employment Service offices to ascertain if there were job vacancies for handicapped individuals; reliance by Vocational Experts on industrial directories to establish that suitable jobs were available; expert testimony that a treating physician had created an emotional disorder by giving a claimant poor advice which he was not qualified to make; Vocational Expert failure to state whether the claimant could pass a pre-employment physical examination; expert failure to consider a claimant's intellectual, as well as physical capacity as reflected in psychological test results; failure to state whether the jobs claimant could do existed in significant numbers; failure to recognize the qualitative differences between heavy manual labor requiring little manual dexterity and light work requiring fine finger dexterity; finally, the vocational testimony statements from local employers that they would not hire handicapped individuals. These and other alleged deficiencies were held sufficiently serious to warrant reversal of the administrative decisions. One Pennsylvania court issued a succession of eleven reversals based solely on Vocational Expert testimony that if claimants told prospective employers of their complaints or showed them medical

reports reflecting an opinion of total disability, they would not be hired. The court called this its "reasonable opportunity to be hired" test and did not abandon it until the Department had successfully appealed one such decision to the circuit court. The circuit court held the test invalid under the 1967 Amendments. In another instance, the district court reversed solely because the Vocational Expert testified that he could not place the individual in any job and he would not be employable without the intervention of Vocational Rehabilitation or similar agency.

However, in several instances the Pennsylvania courts have commented favorably on the qualifications of Vocational Experts, particularly their experience in placing older disabled workers in employment and their first-hand knowledge of job requirements and job opportunities. They have also accepted Vocational Expert testimony on job opportunities based on vocational surveys. They have uniformly affirmed the Secretary where the Vocational Expert testimony included detailed information on job opportunities in the local area, transferability of skills, specific numbers of the various jobs suggested as appropriate, and where their testimony was based on hypotheticals which accurately reflected the medical restrictions. They have made it quite clear through their decisions that Vocational Experts must base their testimony only on the hypotheticals. To illustrate, one court held that where, on the basis of several hypotheticals, the Vocational Expert testified that claimant could perform several enumerated jobs, the decision was supported by substantial evidence. This was so, noted the court, even though the Vocational Expert "disagreed" with that particular hypothetical and also testified that the claimant could not be hired because of local employer hiring practices. The court stated that it was the Hearing Examiner's prerogative to pose hypotheticals and to choose which of the medical reports would be used as basis therefor.

Finally, although the Pennsylvania District Courts and the Third Circuit Court no longer apply the "reasonable opportunity of employment" test, they find very persuasive Vocational Expert testimony indicating that the expert could place individual claimants in employment. In fact, such testimony insulates the administrative decision from judicial criticism by any court, because it meets the requirements of the most liberal statutory interpretation.

The United States Court of Appeals for the Fourth Circuit

This Circuit includes the states of Maryland, North Carolina, South Carolina, Virginia and West Virginia. The vast majority of

disability claimants in this circuit are from rural or small-town areas. There is only one major metropolitan center in the entire circuit, Baltimore. The typical claimant is poorly educated and generally speaking has spent his or her entire working life in one industry, the coal mines in West Virginia and the western portion of Virginia, or the textile mills in South Carolina or western North Carolina. There has been, until recent years, little cognizable diversity of industry in these areas and being products of a one-commodity region these claimants, once they are no longer capable of working at their usual occupation, have an inherent difficulty in attempting to market their occupational skills. Their work has, for the most part been medium heavy to heavy in physical demands and unskilled or, at best, semi-skilled. Considering this with their lack of education, their handicaps may be more economic than physical. Slight impairments to these individuals assume greater occupational importance than would even more severe impairments to their better-trained, better-educated countrymen living in large urban areas where there is a great diversity of industry and commerce. Consequently, the Vocational Expert's role becomes more significant and his testimony more crucial in these circumstances. These courts are acutely aware of the socioeconomic situation in their areas. Moreover, under our system of jurisprudence, the courts are an extension of the attitudes, mores and ideas of the populations in their regions. The decisions of the courts in this circuit, as elsewhere, tend to reflect these local attitudes, even within the framework of a Federal statutory scheme. This is not to say that the local Hearing Examiners are not aware of the same factors. They, however, are under certain statutory and regulatory restraints, which the courts, more often than not, feel do not apply to them. Moreover, the Hearing Examiner decisions are subject to review by a higher administrative body, adding another restraint to any inclinations they may have to interpret the statute and the regulations to reflect local socioeconomic situations. What this discussion is leading up to is simply that the courts of this circuit (and elsewhere to a lesser extent) recognize the importance of Vocational Expert testimony in these geographical regions and consequently have demanded higher standards of performance than most of the other courts in the nation. Judicial criticisms regarding content, qualifications, etc. might well be viewed by both the experts and the Department as attempts by the courts to bring about continued improvements in the program. At the very least, the above discussion should help to explain the reactions of these courts (as well as the courts in other circuits) to Vocational Expert testimony.

The desire on the part of the courts to equalize whatever inequities may have resulted from local economic conditions may offer at least a partial explanation for the various concepts adopted by the Fourth Circuit Court of Appeals, such as the local availability of employment test, the requirement that vocational experts must show that jobs were "actually" available to claimants, and rejection of the Dictionary of Occupational Titles as a basis for testimony on job availability (although later finding that it was an acceptable source for testimony on the first part of the Kerner criteria), and requiring Vocational Experts to "bridge the gap" by showing how occupationally-significant characteristics can be transferred from one's usual job to other jobs in unrelated industries. However, this court's criticisms have, in a negative fashion, been constructive, and have resulted in many of the refinements in vocational testimony which have taken place over the years. Notable among these is the use of vocational surveys as a basis for testifying on the existence of appropriate jobs. At this point, it might be noted that it was not until 1971 that this circuit court specifically acknowledged that the 1967 Amendments had invalidated its criteria on local employment opportunities and "actual" availability of jobs. Their decisions, however, continue to reflect a preference for Vocational Expert testimony showing that job opportunities exist in a relatively restricted geographical area.

The district courts in this circuit have also been responsible for setting forth specific guidelines, again usually in a negative fashion, for acceptable vocational testimony. Most notable among these courts has been the Southern District of West Virginia where the claimant is usually a poorly educated coal miner. This has been the only court, for example, to specifically approve Vocational Expert testimony based on vocational surveys obtained by other experts. This is also the first court to approve Vocational Expert testimony based on his personal knowledge of job opportunities gained through his own vocational surveys. It has also accepted vocational testimony bordering on independent medical evaluations, where the impairment is psychological and the expert's qualifications appear to the court to have equipped him to evaluate such impairments. For the same reason, it has relied on Vocational Expert testimony regarding the effects of medication on work capacity. It has demonstrated a tendency to affirm where the expert "correlates" physical demands and requirements of jobs with residual physical and mental capacities. Despite the 1967 Amendments it continues to feel more confident in affirming where Vocational Expert testimony on job existence is confined to a local region or area. It also expressed a continued preference for testimony on the second part of *Kerner* based on personal knowledge

rather than "arm-chair speculation," particularly if that knowledge was gained by vocational surveys. This court (as well as many others) has gained the impression that since these surveys are undertaken at the request of the Social Security Administration and are to be used solely in our disability cases, the information is designed to correlate with the requirements, whether statutory or court-imposed, of the disability program. It has expressed approval of qualifications of Vocational Experts both as to their education and their experience, particularly where it relates to working with handicapped individuals.

Conversely, it has held that Vocational Expert testimony can be effectively rebutted by the testimony of claimants, statements from employers that they would not hire a particular claimant, and contrary testimony by Vocational Experts testifying on behalf of a claimant. It has also held that reports from Vocational Rehabilitation that claimant was not accepted because of "no opportunity for employment," "impairments too severe," etc., and testimony of lay individuals, could rebut vocational testimony. This court has also rejected Vocational Expert testimony on the basis of ambiguity, where the testimony was that employers hired the handicapped, yet the claimant had no "transferrable skills." It has held that the existence of only one or two positions in a given job category did not constitute significant numbers.

The other high volume court in the Fourth Circuit, South Carolina, has also made comments on vocational testimony worth mentioning. Unlike the West Virginia, Pennsylvania and Ohio courts, which will be discussed below, it has given the Department very little guidance as to what it finds objectionable in Vocational Expert testimony. Moreover, where the court has given specific criticisms for rejecting Vocational Expert testimony, and the Department has made efforts to overcome such criticisms, the court would still reject vocational testimony. Often if it could find nothing specific to criticize, it would resort to language bordering on the abusive. It has called Vocational Experts "incompetent" and guilty of "ivory tower" thinking. It has found Vocational Expert testimony unacceptable because the expert did not examine or interview claimant before the hearing, because he did not live in the same area as claimant, or because the testimony was "hypothetical," "abstract" or "irrelevant." Rarely does it give its reasons for coming to such generalized conclusions. This court has described Vocational Experts as "circuit riders" who travel around with the Hearing Examiner for the purpose of denying claims. More specific defects, according to the court, have been the expert's testifying on a hypothetical assumption instead of on his own independent evaluation of medical evidence, while in other

instances, the expert did not testify on the basis of a hypothetical, but instead made his own independently arrived at medical judgment. It has also rejected testimony: because the expert was "evasive" in refusing to answer questions on hireability, etc.; or because testimony was rebutted by documentary evidence that a particular job suggested as appropriate was obsolete "in the South"; because the expert failed to consider "employment practices" (even after the 1967 Amendments); because the expert's reliance on the Dictionary of Occupational Titles rendered his testimony "speculative"; and because the expert failed to state the jobs were available locally (also after the 1967 Amendments). This Court has, however, affirmed the Secretary where the expert testified that he has placed in employment individuals with impairments similar to the claimant's, and where the expert has testified on the basis of vocational surveys conducted within 30 miles of a claimant's residence. It has also affirmed in cases where the testimony by one expert was based on a different Vocational Expert's surveys.

The United States Court of Appeals for the Fifth Circuit

This Circuit includes the states of Alabama, Florida, Georgia, Louisiana, Mississippi and Texas. This is one of the three circuits producing the highest volume of disability claims, the others being the Fourth and the Sixth. It is the first of these three Circuit Courts to rely on Vocational Expert testimony to affirm the Secretary (*Gardner* v. *Gunter* 354 F. 2d 755)[1]. This decision was particularly welcome, because it came after the Fourth and Sixth Circuit Courts of Appeals had indicated disapproval of the Vocational Expert technique. These latter decisions had raised some fears that Vocational Expert testimony would meet the same fate at the hands of the courts as did the written vocational treatises. The *Gunter* decision was also noteworthy, because it represented judicial acceptance of the premise that impaired individuals with no transferrable skills could still work, the court observing that the Vocational Expert had suggested only entry-level jobs for the claimant.

Unlike the Fourth and the Sixth it has never opted for a geographical employment test. This is probably due to the fact that there are many large metropolitan areas with job opportunities in large numbers ranging from heavy to sedentary and unskilled to highly skilled. However, in a 1966 decision it adopted an "availability" concept which the Department could not accept. It defined this term as the reasonable opportunity of impaired individuals to

[1] (See Exhibit II)

compete for employment, and equated the inability to "compete for" or "obtain" employment "with statutory disability." Significantly, the court relied upon Vocational Expert testimony to reach this conclusion. The decision was referred to as the type of judicial legislating which was eroding the disability program, and the Congressional deliberative reports made it clear that the 1967 Amendments were directed to overcoming its impact on the program. The language regarding hiring practices was incorporated into the statute as a result of this decision and its progeny. The court quickly recognized the Congressional intent, repudiated the concept and has adhered to the view that inability to perform is the only criterion for determining disability. Unfortunately, some of the district courts within this circuit continue to apply the repudiated criteria to reverse administrative decisions.

Some of the other positive contributions by this circut court are its approval of use by Vocational Experts of U.S. Census material upon which to base their testimony on job incidence, and the conclusion that Vocational Expert testimony was entitled to greater weight than testimony by personnel officers of private companies.

On the negative side is a recent lengthy opinion in which the court rejected Vocational Expert testimony because of the manner in which the Hearing Examiner questioned him. The court noted that the Vocational Expert's "initial impression" was that claimant was probably unemployable, but the Hearing Examiner by "skillful cross-examination" and altering the hypotheticals had caused the expert's "conversion upon the stand" to be a witness adverse to the claimant. The court remanded his case for new testimony by the same expert. At least one district court in the Fifth Circuit has construed this opinion to mean that Hearing Examiners may no longer elicit Vocational Expert testimony on the basis of hypothetical assumptions and the expert must rely instead on his own evaluation of the evidence. The court also concluded that under the Court of Appeals decision, Hearing Examiners are forbidden to "cross-examine" Vocational Experts. This thesis is considered so diametrically opposed to Department policy that the circuit court has been asked to rule on its validity. It should be noted parenthetically that this district court had taken the position in prior years that Vocational Expert testimony would be more credible if it were based on the expert's own evaluation of evidence, since the Hearing Examiner can, in effect, elicit whatever testimony he wishes through the working of the hypotheticals.

The district courts in this circuit have found persuasive, Vocational Expert testimony based: on personal knowledge of jobs in the area; where the expert has experience in the placement of

handicapped individuals in appropriate jobs; and on statements that the expert would "personally hire" claimant for the suggested jobs. Several Fifth Circuit District courts have held that Vocational Expert testimony can effectively rebut opinions of total disability given by physicians. Testimony predicated on vocational surveys has been described as "extensive and realistically oriented" and the courts have accepted testimony based on the Occupational Outlook Handbook. Conversely, decisions by the Fifth Circuit district courts reflect a reluctance to accept testimony on ability to perform when couched in terms such as "possibly" or "might be able," etc. One court stated that the experts should only testify on "probabilities" and not "possibilities."

On occasion, the Fifth Circuit courts have also refused to give weight to Vocational Expert testimony for many of the same reasons advanced by courts in other circuits, such as failure of the expert to "examine" the claimant, reliance on the Dictionary of Occupational Titles, because he independently arrived at a medical judgment although not a medical doctor, and because the expert did not live in the same community as the claimant and therefore could not have personal knowledge of job opportunities there. In one instance, the court rejected vocational testimony because the expert was still a college student when the claimant's insured status expired and therefore lacked personal knowledge of the existence of job opportunities at that crucial period of time. Finally, a Mississippi court issued a decision seriously questioning the technique itself, describing it as a violation of due process which could be cured only by having the experts questioned by a "third party" rather than by the Hearing Examiner.

The United States Court of Appeals for the Sixth Circuit

This Circuit includes the states of Kentucky, Ohio, Michigan and Tennessee. The circuit court was one of the earliest to comment on Vocational Expert testimony, but unfortunately it chose to follow the lead of the Fourth Circuit Court (supra) and reacted adversely. It reversed in the first Vocational Expert case on the grounds that the expert relied exclusively on the Dictionary of Occupational Titles, lacked personal knowledge of job "opportunities" and was evasive and equivocal in stating whether any jobs the claimant could do existed in the general area in which the claimant lived. The situation would progressively deteriorate before improving. For example, in the very next Vocational Expert case, the court in the most caustic language ever employed to describe a Vocational Expert, called him a "stock figure" in our cases who relied as usual on the Dictionary of Occupational Titles.

His testimony was described as "unimpressive," "absurd" and "peculiar" in light of the claimant's impairments. The court concluded that the testimony was entitled to "no weight." This was followed by a decision which left the impression that this court would never accept Vocational Expert testimony. The court stated: "This case represents the fallacy of a procedure by which so many applicants have been denied disability benefits * * *. It used to be that the Secretary would only determine that while the disabled man could not return to his former work, he could, nevertheless, perform substantial gainful employment. The courts in such cases required the Secretary to specify what types of employment such an applicant could perform. Thereafter, the Secretary, in these cases found that a worker who could not perform the same work as before his disability, could * * * perform light work of a substantial gainful nature, and then adopted the method of having a Vocational Counselor, who had never examined or questioned the applicant, read from a list of 20,000 jobs and recite all the so-called light jobs that such a worker * * * could perform. *This whole method lacks reality.*" (Emphasis added.) The Court went on to conclude that Vocational Expert testimony, per se, was "without evidentiary value," and that the Secretary would have to show that there were job vacancies for "disabled workers" to sustain its burden of proof. This court had previously adopted *Kerner* and had also expressed some reluctance to accept textual vocational evidence. Thus, the Department found itself in something of a dilemma in trying to produce evidence which would satisfy this circuit court and its district courts (many which quickly adopted the circuit court's views on Vocational Expert testimony). Of great fiscal significance was the fact that these courts reviewed an extremely large number of our disability decisions.

Fortunately, the court soon recognized the dilemma and the majority of its members refused to adopt the views expressed in the foregoing decisions. This is amply demonstrated by the statistics showing that this Court has affirmed the Secretary in 31 cases where Vocational Experts testified and reversed in only seven. Five of the seven reversing decisions were written by the judge who had categorically rejected the Vocational Expert concept. Moreover, the content of their decisions are of more significance than these statistics. It has held that Vocational Expert testimony can satisfy the requirement of showing that suitable jobs are "available" by relying on personal knowledge and on 1960 census material. It has also held that a Hearing Examiner can accord more weight to Vocational Expert testimony on availability of jobs than to contrary testimony by a State Employment Office

Manager. In several decisions, the court took note of the "unchallenged" expertise and qualifications of the expert who had earlier been described as a "stock figure." The court has also taken the position that the expert need not testify that a specific job was available with a specific employer in order for his testimony to be accepted, under either the statute (pre-1967 Amendments) or the criteria of the court. It was, however, one of the first Courts of Appeals to require the Secretary to show that job opportunities are reasonably available "in the general area," which handicapped individuals could perform with their limited capacities. It continued to apply this test until the enactment of the 1967 Amendments.

Shortly after the amendments, the court held that the "general area" test had been "nullified." It did so in a case where the Vocational Expert admitted that there were no suitable jobs within 150 miles of the claimant's home. The court has steadfastly adhered to this view ever since. In addition, a recent decision held that Vocational Expert testimony need not be rejected solely because the expert does not have "personal knowledge" of the existence of appropriate jobs for a claimant, and can base his testimony on "secondary sources" such as industrial and manufacturing directories.

The experience in the district courts represents an excellent example of the type of socioeconomic considerations which enter into judicial decisions. For example, the cases reviewed by the Kentucky and Tennessee courts involve for the most part life-long coal miners or loggers who lived in rural areas where there was little industrial activity. Consequently, these courts were quick to seize upon the local availability test to reverse the Secretary in a large percentage of cases, holding that when claimants from these areas (who were also usually poorly educated and lacking in occupational skills) established that their impairments prevented them from engaging in their usual work, they were at the same time rendered incapable of engaging in any type of work. For their evidentiary basis the courts relied upon the testimony of Vocational Experts that suitable jobs (usually light or sedentary) did not exist in the coal-mining or lumber-producing regions of Eastern Kentucky or Eastern Tennessee. This explains why the Bureau of Hearings and Appeals requested Vocational Experts in these areas to conduct vocational surveys to determine if, in fact, there was any significant industrial activity. When these Vocational Experts learned that there was considerably more than even they were previously aware of, and were able to testify to that effect, the courts generally affirmed. Thus, the vocational surveys undertaken in these states served a dual purpose (as they did in several other areas): they educated both the Voca-

tional Experts and the courts, and concomitantly, an unfavorable trend was converted into a favorable one. Even at present, notwithstanding the language of the 1967 Amendments, the Kentucky and Tennessee courts are reluctant to affirm unless the Vocational Expert has testified on the existence of jobs on the basis of personal knowledge, either from his own past experience or through vocational surveys.

On the other hand, the courts in Ohio and Michigan have rarely, if ever, rejected Vocational Expert testimony because of inadequate testimony on the second part of *Kerner*. This could probably be explained by the high degree of industrial and commercial activity to be found in these states. Instead, they have concentrated their criticism on testimony on the first part of *Kerner*. Some of the strongest and most pointed criticism has emanated from these courts, most notably the Southern District of Ohio. These courts have commented on the failure of Vocational Experts to: consider subjective symptoms or psychological factors in testifying that there were jobs for handicapped claimants; delineate the physical demands, requirements and skills of former employment as well as of the jobs which were suggested as suitable for the claimants; and relate past skills and employment, as well as age and education, to the skills required for performing jobs within their diminished physical capacity. Finally, these courts have been extremely critical of Vocational Experts "spilling over" into the medical area and failing to confine their testimony to the hypothetical assumptions.

The United States Courts of Appeals for the Seventh and Eighth Circuits

The Seventh and Eighth Circuits have never presented any serious problems regarding the acceptability of Vocational Expert testimony. Until 1971, the former (comprised of Illinois, Indiana, and Wisconsin) never required live vocational testimony but accepted reliance by the Hearing Examiner on industrial studies as proof of the employability of handicapped individuals. This was dramatically changed when the Seventh Circuit Court of Appeals reversed in one instance for lack of Vocational Expert testimony; and in another, a childhood disability claim, remanded for such testimony. The Eighth Circuit Court (which reviews appeals from courts in Arkansas, Iowa, Minnesota, Missouri, Nebraska and North and South Dakota) has never accepted the *Kerner* theory of shifting the burden of proof to the Secretary where an individual shows he is no longer able to do his former work. This was emphatically restated in its most recent decision wherein it held that this theory is a "misconstruction" of the Social Security Act.

The United States Court of Appeals for the Ninth Circuit

The Ninth Circuit Court (Alaska, Arizona, California, Hawaii, Nevada, Oregon and Washington) and the district courts have also provided limited comments regarding Vocational Expert testimony, but only where there is a showing of a "substantial" impairment which would render one's employment potential virtually nil. This court has held, in effect, that if the medical evidence indicates that a claimant has the capacity to do some type of work, e.g., "light work," the Secretary need not produce Vocational Expert testimony but can take administrative notice that light work exists in the national economy. One of the more noteworthy decisions by this circuit court was one issued in late 1971, in which the court held, among other things, that the Vocational Expert, who was "trained in psychology and career guidance," could properly testify that a psychological overlay was not severe enough to preclude work. Neither the circuit court nor the district courts, with one exception, have ever opted for the local availability test or for any hireability test. This exception is the District of Oregon (or more accurately one of its members). This judge has come as close as any to rejecting the Vocational Expert technique itself. He rarely affirms the Secretary when a Vocational Expert is used, and adheres to an employability test which has resulted in decisions favorable to small town residents and unfavorable to claimants unfortunate enough to live in or near Portland, the only city of appreciable size in the state. These decisions have had the effect of reducing the 1967 Amendments to a nullity. In addition to rejecting Vocational Expert testimony for failure to show the existence of jobs locally, this judge has rejected it for a variety of other reasons. Included are: failure to examine the claimant; failure to show employers would "hire" the claimant; and failure to show that a claimant could "compete in the open market" for jobs within his physical capacity.

The only other decision of note was one recently issued by a California Court in which it held that vocational testimony is acceptable only if it is based on hypothetical assumptions. Only under this method is the expert prevented from testifying on "capacity" for work and therefore his testimony is confined to whether the individual is qualified by reason of his age, education and experience to perform the duties of jobs and whether such jobs exist in significant numbers in the national economy.

The United States Court of Appeals for the Tenth Circuit

The Tenth Circuit Court of Appeals very early adopted *Kerner* and expanded it to require Vocational Experts to show that local

employers would hire the handicapped. This was cause for some concern in the Department because this Circuit is made up of states known to have vast areas with few or no inhabitants, much less industrial or commercial activity. These states are Colorado, Kansas, New Mexico, Oklahoma, Utah and Wyoming. However, with the 1967 Amendments the circuit court did a complete about-face and the district courts have followed its example. Nevertheless, these courts generally prefer Vocational Expert testimony based on sound hypotheticals and vocational surveys. This is particularly true of the New Mexico and Oklahoma courts. Moreover, the circuit court itself, in one decision, leveled the most pointed criticism to date of Vocational Expert "spill over" into the medical area. The court made it clear that it could not accept as credible any Vocational Expert testimony based on the experts' independent evaluation of the medical evidence, since Vocational Experts are not qualified as "medical experts."

The United States District Court of Appeals for the District of Columbia

With respect to D.C. Court of Appeals, it does require Vocational Expert testimony and has reversed the Secretary in one instance because it failed to produce live Vocational Expert testimony. Since the claimant lived in a foreign country, the Department viewed this decision with a great deal of concern.

Summary

Hopefully, this chapter will offer the reader some insight into judicial reaction to an evidentiary element rarely encountered in the administration of other public or private benefit-paying programs such as that under the Social Security Act. It might be expressed as somewhat of a love-hate experience, and is best exemplified perhaps by the reaction of one court, South Carolina. Recalling the discussion of the past reaction of this court to Vocational Expert testimony, the conclusion reached is that it had taken the position that these experts were anathema, since they were used for the sole purpose of supporting denials of benefits (of course the courts do not review those administrative decisions favorable to claimants). In a decision issued only two weeks before this article was written, this court remanded (returned) a case for vocational testimony utilizing language which suggests that such testimony is required in every disability benefits case. The court stated, "Thus, when disability benefits are denied, it should be manifestly clear from the record that there is employment available to persons with plaintiff's characteristics and the job opportunities must be actually, not merely theoretically, available. Given claimant's hyperreaction to an admitted impairment, given her

age and education, this court feels that a vocational counselor should be asked to testify as to her ability to obtain gainful employment *in her previous work or in lighter work*. This would be in the interest of fair play."

Exhibit I

United States Court of Appeals
for the Fourth Circuit

Eugene Kyle,

Appellant,

versus

Wilbur J. Cohen, as Secretary
of Health Education and
Welfare, Washington, D. C.,

Appellee.

Appeal from the United States District Court for the District of Maryland, at Baltimore: Edward S. Northrop, District Judge.

Before **Haynsworth**, Chief Judge, and **Sobeloff** and **Boreman**, Circuit Judges.

Boreman, Circuit Judge:

Eugene Kyle (hereafter Kyle or claimant) appeals from the order of the district court affirming the denial of the Secretary of Health, Education, and Welfare of his application for disability insurance benefits under sections 216(i) and 223 of the Social Security Act.[1] Upon review of the entire record we affirm the lower court's finding of substantial evidence to support the decision of the Secretary.

Kyle, an illiterate laborer now about fifty-seven years old, began working at age thirteen. Until 1954 he was employed for the most part as a coal miner in West Virginia. From 1954 until 1965, he did construction work in Baltimore, Maryland, as a pipelayer, ditchdigger, wall-stripper and, most recently, as a "pusher" and co-worker with a labor gang. The record clearly reveals that he is an accident-prone individual and that he is physically impaired as a result of a long history of rather severe injuries. In 1947, he was in an automobile accident in which he sustained fractures of both legs plus injuries to the stomach, head and throat; in 1950, he fractured his left shoulder in a fall; in 1955, he twisted his left knee while working for a construction company; in May 1959, he was temporarily totally disabled when his right leg was cut, but no permanent disability resulted therefrom; in December of 1959, he injured his back, resulting in 15% permanent partial disability according to his own doctor and 5% permanent partial disability according to an insurance doctor; in 1961, he injured his left hand

[1] 42 U.S.C. §§ 416(i) and 423.

and settled his workmen's compensation claim therefor on the basis of "more than 35%;" in 1962, he injured his left side and back for which he was awarded 10% disability by the Workmen's Compensation Commission of Maryland. *He was able to return to his normal work at heavy labor after each of these accidents.* On April 26, 1965, he suffered a broken right leg when buried to the waist by a ditch cave-in. Although the medical reports show that his leg was healed with no more than minimal disability, he has not returned to work since that time.

The record indicates that Kyle has minor arthritis in his knees and ankles, high blood pressure (controlled by medication), a slightly enlarged heart, and a latent syphilitic condition. The essence of his claim is that his over-all medical condition and the residual difficulties from his prior accidents, combined with and aggravated by the physical trauma caused by the ditch cave-in, prevent him from performing any work for which his age, vocational background and education would otherwise qualify him.

Kyle offered subjective evidence of pain and other symptoms tending to establish his disability. He testified that he experienced, inter alia, dizzy spells, blurred vision, shortness of breath, headaches, pain in the chest, back and legs, and swollen knees and ankles. Indeed, as the Hearing Examiner stated, "The claimant complained of difficulty with practically every part of his body, head, and extremities. When the Hearing Examiner called to the claimant's attention that he had not indicated any injury to his right forearm or hand, the claimant responded that he had difficulty with that extremity also in that the fingers of the hand would draw up in the shape of a claw; this also happened to the left hand." [2]

[2] It is clear from the Hearing Examiner's opinion that he did not believe that Kyle's testimony presented an accurate picture of claimant's physical condition. The examiner stated:

> In the opinion of the Hearing Examiner, this claimant his decided that he will not again place himself in danger of another cave-in and that he will not transfer his residual physical capacity to a less remunerative and less dignified occupation. This the claimant has a right to do. But the symptoms of which he complains as justifying his decision are grossly exaggerated and unpersuasive. The claimant's tendency to exaggerate symptoms is patent. He is seizing upon every possible symptom from which he has suffered in the past and which is suggested to him now to excuse his not returning to gainful activity. He has no desire to return to the dangers of his usual work even though he is no more physically impaired now than he was immediately preceding the most recent fracture of the right leg. Although this claimant previously showed good motivation in returning to work following injuries of a much more serious nature, he apparently has lost that motivation after an injury which did not serve to disable him for a continuous period of not less than 12 months.

Claimant's wife testified that Kyle complained of stiffness of his right leg in the mornings, or shortness of breath, and of trouble with his legs while walking down steps. She stated that he could do no work around the house except light cleaning.

The opinion evidence offered before the Hearing Examiner as tending to support Kyle's claim consisted primarily of the transcript of the testimony of Kyle's treating physician, Dr. Caguin, and Mrs. Julia Gerber, the owner/operator of several employment agencies, the testimony of these witnesses having been given at an earlier hearing before the Workmen's Compensation Commission of Maryland. Dr. Caguin had testified, in part, that in his opinion Kyle was permanently fifty per cent disabled in his body as a whole, that Kyle could not go back to his previous work at heavy labor, and that he did not know of any gainful work that Kyle could do. Mrs. Gerber had testified that she interviewed Kyle on two occasions and concluded that he was not capable of gainful employment by her standards or those of her clients.

The opinion evidence unfavorable to claimant consisted primarily of the testimony of Dr. Johnson, the expert medical witness called by the Hearing Examiner, and Mr. Julian Nadolsky, a vocational evaluator for the Baltimore League for Crippled Children and Adults, who appeared as the Vocational Expert for the Secretary. Dr. Johnson had never examined Kyle. He formed his opinions from an examination of the medical records and the testimony presented at the hearing. He concluded that claimant would have no substantial difficulty in performing "light to moderate work." Mr. Nadolsky did not interview Kyle and he did not test him for vocational aptitude. He testified on the basis of Kyle's background, vocational and medical histories, the testimony presented at the hearing, and a "survey" which he had conducted among several employers concerning job availability. It was his opinion that Kyle could "engage in light laboring occupations such as a porter, a janitor, or possibly, the signal man in the construction industry and possibly in a laundry as a sorter of laundry and folder."

Also in the administrative record were the additional reports of three other physicians who had examined Kyle and two who had not. Of these reports only one may be considered favorable to Kyle's claim.[3]

[3] The introduction into evidence of the four "unfavorable" reports was objected to at the examiner's hearing by Kyle's attorney on the ground that the doctors were not subject to cross-examination, and in two instances on the additional ground that the doctors had not examined Kyle. Kyle's attorney also objected to the testimony of Dr. Johnson because he had never examined Kyle, and to that of Mr. Nadolsky, because he had never interviewed or tested

Kyle urged in brief and oral argument that the opinions of Dr. Johnson, who had never examined him, and Mr. Nadolsky, who had never interviewed him or tested him, cannot constitute substantial evidence to support a finding of nondisability when countered by the opinions of Dr. Caguin, the treating physician, and Mrs. Gerber who twice interviewed Kyle before concluding that he was unemployable. In support of this position, when submitting the case, Kyle relied heavily upon *Cohen v. Perales*, 412 F.2d 44 (5 Cir. 1969), which held that the testimony of a nonexamining expert medical witness cannot serve to corroborate the hearsay reports of absent doctors, and that mere uncorroborated hearsay cannot constitute substantial evidence to support an examiner's decision adverse to the claimant. Denying the Secretary's petition for a rehearing and petition for rehearing en banc, the *Perales* court made it clear, however, that its decision applied only "if the claimant objects to the hearsay evidence and *if the hearsay evidence is directly contradicted by the testimony of live medical witnesses* and by the claimant who testify in person before the examiner * * *." *Cohen v. Perales*, 416 F.2d 1250, 1251 (5 Cir. 1969). (Emphasis added.)

Kyle called our attention also to a prior decision of this court, *Hayes v. Gardner*, 376 F.2d 517 (4 Cir. 1967), in which we reversed the Secretary's denial of disability benefits where the report of a treating physician indicated that the claimant was disabled and the only basis for the Secretary's decision was the opinion of the expert medical witness who did not examine the claimant. In that case, 376 F.2d at 520–21, we concluded that "In view of *the opinion evidence as to the existence of a disability*, combined with the overwhelming medical facts, the uncontradicted subjective evidence, and the claimant's vocational background, the opinion of a doctor who never examined or treated the claimant cannot serve as substantial evidence to support the Secretary's finding." (Emphasis added.)

After the instant case had been submitted on appeal a written opinion was prepared but we then deemed it advisable to await review of *Cohen v. Perales*[4] by the Supreme Court which had granted certiorari[5] to resolve the procedural due process issue presented in *Cohen, supra*. The case was decided by the Supreme Court, *sub nom. Richardson v. Perales*, 402 U.S. 389 (1971).

him. The qualifications of Mr. Nadolsky as a Vocational Expert were also challenged. The district court ruled that the examiner properly admitted these reports and testimonial evidence. We conclude that the points presented on this appeal are without merit as will hereinafter appear from the opinion.

[4] 412 F.2d 44 (5 Cir. 1969); rehearing denied with explanatory comment, 416 F.2d 1250 (5 Cir. 1969).

[5] *Cert. granted sub nom.* Finch, Secretary of Health, Education and Welfare v. Perales, 397 U.S. 1035 (1970).

In *Richardson v. Perales* the Court explicitly approved HEW procedure whereby written reports of physicians are received in evidence, despite their hearsay character and the absence of an opportunity to cross-examine the reporting doctors. Moreover, the Court held that such written reports may constitute substantial evidence within § 205(g) of the Social Security Act [6] to support rejection of disability claims, notwithstanding the presence of directly opposing testimony by the claimant and direct medical testimony favorable to him.

In the instant case Kyle challenged the Hearing Examiner's acceptance of reliance on the testimony of the HEW physician-consultant, Dr. Johnson, who had never examined claimant but instead based his evaluating opinion of claimant's physical condition on a review of the record, including the challenged physicians' reports. The district court in *Perales v. Secretary*, 288 F.Supp. 313 (W.D. Tex. 1968), and the Fifth Circuit in *Cohen v. Perales, supra*, criticized the practice of relying on such medical advisers. Any doubts one may have entertained concerning the use of these consultants were put to rest by the Court in *Richardson v. Perales, supra*,—* * * we see nothing unconstitutional or improper in the medical adviser concept * * *." [7]

Furthermore, the Court, referring to the statutory phrase, "supported by substantial evidence," restated its long-standing pronouncement that "substantial evidence" means

> " 'more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " [8]

Even though the vocational expert witness, Mr. Nadolsky, did not interview or test claimant, the Secretary was clearly entitled to consider his testimony. Indeed, in view of claimant's tendency to exaggerate the symptoms of his physical impairment [9] it is likely that Mr. Nadolsky was able to form a more reliable opinion concerning claimant's vocational capabilities than was the witness Mrs. Gerber, as her opinion was formed at least partially from what Kyle told her during two interviews.

The Secretary's denial of disability benefits was found by the district court to be supported by substantial evidence and the court's refusal to disturb the Secretary's decision is approved.

Affirmed.

[6] 42 U.S.C. § 405(g), relating to judicial review, states:
The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive. . . .

[7] 402 U.S. 389, at 408.

[8] 402 U.S. 389, at 401.

[9] See footnote 2.

Exhibit II

In the
United States Court of Appeals
for the Fifth Circuit

John W. Gardner, Secretary of Health, Education & Welfare,

Appellant,

versus

Eugene O. Gunter,

Appellee.

Appeal from the United States District Court for the
Middle District of Alabama.

(December 21, 1965.)

Before **Tuttle**, Chief Judge, **Rives** and **Gewin**, Circuit Judges

Per curiam: This appeal is from a decision of the district court reversing the determination of the Secretary of Health, Education and Welfare that Gunter was not disabled within the meaning of sections 216(i) and 223 of the Social Security Act, 42 U.S.C.A. 1416, 1423, and, therefore, was not entitled to disability insurance benefits. The district judge found that the Secretary had misapplied the law and that his determinations were not supported by substantial evidence.[1]

After carefully reading and considering the entire record, including the administrative proceedings and the testimony and exhibits, we reluctantly hold that the district court erred.

Grant (sic) was 49 years old at the time of this disability application. He had completed the fourth grade and his work experience included farming, textile machine operations, concrete work, service station attendant and setting burial vaults. He was recently rejected for re-training by the State (Alabama) Rehabilitation Service. He has no physical defects (other than the one in question here), is neat and clean, appears intelligent and well nourished.

[1] As to the scope of judicial review, see 42 U.S.C.A. 405(g); Celebrezze v. Maxwell, 5 Cir. 1963; 315 F.2d 727, 730; Celebrezze v. Kelly, 5 Cir. 1964, 331 F.2d 981, 982; Celebrezze v. O'Brient, 5 Cir. 1963, 323 F.2d 989, 990.

On April 25, 1963 Gunter applied to establish a period of disability and for disability insurance benefits. After the application was denied, Gunter requested and received a hearing before a Hearing Examiner. At this hearing the following evidence regarding Gunter's alleged disability was disclosed: Gunter suffers from pulmonary emphysema, a disease of the lungs whereby they lose elasticity; his case was characterized as "moderately severe" by one doctor and as "chronic-advanced" by another. Two doctors emphasized that Gunter should not be exposed to the cold any more than necessary, since his condition would be aggravated by upper respiratory infections. Although it was clear that Gunter could no longer perform arduous physical or manual labor, two doctors, including Gunter's personal physician, testified that he was capable of doing some type of light or sedentary work over a prolonged period of time. Gunter's doctor testified that he could "walk around fairly well" at his own pace and that he had "pretty good pulmonary function." Two doctors stated that the results of certain vital capacity tests performed on Gunter were favorable. Although Gunter was pronounced "100% disabled" with regard to gainful employment by one doctor, Gunter's own doctor qualified this conclusion as being true only to the extent that it meant Gunter could no longer do the heavy physical labor which he had previously done. Beyond that, the same doctor said that his abilities may only be gauged according to his specific reaction to given situations. Although Gunter's ailment is generally progressive, it can become stationary and might even improve under proper treatment.

William Hopke, Ph.D., an associate professor of education at Florida State University, appeared and testified as a Vocational Expert. His qualifications included work with disabled veterans for the Veterans Administration, which involved placement of handicapped veterans as well as vocational rehabilitation. He also trained vocational counselors for employment service work. Prior to the hearing, he had studied the reports and other data relevant to Gunter's case; he heard all of the testimony at the hearing. Dr. Hopke testified that notwithstanding Gunter's limited education and work experience, there were a number of indoor jobs having light or sedentary work which he could apparently perform with little or no training. Basing his opinion upon the evidence relating specifically to Gunter's situation, as well as upon his experience with other emphysema and TB sufferers, Doctor Hopke enumerated several jobs Gunter was able to perform, e.g., bottle inspector, boxer or carton closer, retail package wrapper or hand wrapper or a buckle looper. Moreover, in describing the nature of the

work in these jobs, Dr. Hopke indicated several firms in the area of appellee's home which might provide such employment.

There was substantial evidence that although he did suffer from emphysema, Gunter had the residual physical capacity to perform light or sedentary indoor work over a prolonged period. Dr. Hopke's testimony is "substantial evidence" to support the Secretary's determination and to render Gunter's ability to engage in substantial, gainful activity more than merely "theoretical." Although one doctor did contradict this testimony in his description of Gunter as "appears 100% disabled" with reference to gainful work, Gunter's own doctor admitted that he could not agree with this conclusion as far as Gunter's ability to perform light or sedentary work was concerned. In the face of this and in light of the fact that Dr. Hopke's testimony was otherwise substantially unrefuted, we think that the trial examiner properly rejected the "100% disabled" remark as an opinion on the ultimate issue, which was a matter for his resolution alone.

It appears to us that the district court erred in concluding that the Hearing Examiner failed to consider Gunter's age, training, education and work experience, since Dr. Hopke was careful to point out that each of the occupations he suggested for Gunter required little or no training. In reversing the trial examiner on this point, we think the district judge invaded the credibility-resolving province of the Secretary.

The district court concluded that the Secretary's decision "was based upon a determination that mere theoretical ability to engage in substantial gainful activity is enough" to preclude Gunter's claim, "even though when considering the experience, the education and the vocational training of the applicant there is no reasonable opportunity for employment available," and that this was a misapplication of the law. Without disagreeing as to the applicable law, we find that the Secretary's decision was based upon Gunter's education, work experience and age. In order to assure that Gunter's ability to engage in substantial, gainful activity was more than just "theoretical," the Secretary called a Vocational Expert (Dr. Hopke) to testify as noted above. The Hearing Examiner was careful to ascertain, through specific questions, that Dr. Hopke's testimony was applicable to Gunter himself and the level at which he (as opposed to persons in his general category) could function education-wise and vocation-wise. In his decision, the examiner said:

> "It is evident, too, that Dr. Hopke gave considerable attention to this claimant's limited educational and vocational background since the jobs he described require negligible educational background and only minimal

training requirements for their performance. Dr. Hopke also noted in his testimony that such jobs are normally found in industries which exist within the area where the claimant resides."

The district judge's conclusion that the Secretary applied an erroneous legal standard is unfounded.

The judgment is reversed and the case remanded for the entry of a final judgment for the Secretary.

Reversed and remanded

Adm. Office, U.S Courts—E. S. Upton Printing Co., N.O., La.

Chapter VI

Forensic and Other Issues in Vocational Expert Testimony[1]

Harry K. Easton

Interaction of psychology and law is relatively unfamiliar to most psychologists and counselors, yet it is of importance if the democratic concept of justice is to be efficiently implemented. The increased use of psychologists and counselors as expert witnesses makes it very important to determine their qualifications, training, and role behavior. Definitive knowledge about their educational preparation, their perception of their assets and liabilities, evaluation of their functioning by attorneys, documentation of their experience, and other related data are necessary.

The Vocational Expert program sponsored by the Social Security Administration, Bureau of Hearings and Appeals, offers an opportunity to explore these issues. Although the Vocational Experts are providing expertise on content with an emphasis different from court issues of responsibility, mental fitness, and insanity, there is considerable generalizability from the Vocational Expert's role to that of the expert psychological witness in most court room settings. The Vocational Experts are related to the whole complex area of forensic psychology. Data from this study offer some conceptual material on Vocational Experts which thus (1) provides a clarification of the Expert's role in Social Security hearings, (2) explores the needs of experts, psychologists, and counselors for legal training in university settings and post-graduate programs, and (3) facilitates a greater understanding of the issues underlying relationships between the legal profession and the disciplines of psychology and counseling.

A review of the literature indicates that there is no previous comprehensive study in which the functioning of expert witnesses was explored. The literature was limited to descriptions and position papers regarding psychology and the law. The general conclusion from this work is that forensic involvement of psychologists and counselors is perceived as a formidable and difficult area. The literature regarding the Social Security Vocational Expert program suggested that a wide diversity of opinion exists as to how experts should conduct themselves in a hearing.

This research employed a questionnaire designed to elicit information and attitudes about the Vocational Expert's role and re-

[1] Excerpted from Easton, Harry K., Ph.D. dissertation, *Forensic Issues as Related to the Vocational Experts Participation in Social Security Disability Hearings*, Northwestern University, 1969.

lated forensic issues. The questionnaire included a section in which descriptive data were to be gathered, a ninety-three item Likert-type attitude scale, and an open-ended section where unstructured information could be provided by the respondent. With the assistance of the Social Security Administration, Bureau of Hearings and Appeals, the questionnaire was mailed to all Vocational Experts and to selected hearing examiners who participated in the program.

The descriptive data from the questionnaire indicated that Vocational Experts were a highly educated group. Over two-thirds had a Doctorate in the fields of psychology, counseling or education. Their professional experience was varied, with roughly two-thirds in fields of administration or college teaching.

A crucial finding was the Vocational Expert's lack of current experience in working directly with handicapped clients, despite the fact that their work in the Social Security program involves this type of client. Only fifty percent were presently working in some type of direct relationship with the handicapped. Furthermore, only fifty percent of the Vocational Experts responding stated that they had had experience in the placement of handicapped clients in competitive work situations. This finding is in contrast to the specified qualifications and duties of the Vocational Expert and is a deficiency in his capacity to function in the expert witness role in Social Security disability hearings.

Two further areas for improvement were noted. First, it was found that Vocational Experts as a group had only limited experience in providing testimony in Social Security disability hearings. Whereas a small minority of consultants had testified a large number of times, fifty percent of those responding had testified in thirteen or fewer cases. Second, in addition to this meager experience in disability hearings, course work in psychology or counseling related to law was practically non-existent. Furthermore, the observation of hearings for didactic purposes was limited with only one-fifth of those responding indicating such experiences.

In discussing the findings from the ninety-three Likert-scaled items, both difference and agreement between Vocational Experts and Hearing Examiners were analyzed and will be discussed in terms of four categories: (1) preparation and hearing procedures, (2) ethical and professional issues, (3) competencies needed by Vocational Experts, and (4) philosophy about the Social Security program.

1. Preparation and Hearing Procedures

There are four areas within the framework of the prehearing and hearing process in which significant differences occurred between

the responses of Hearing Examiners and Vocational Experts. These are: (a) the content of the exhibits, (b) pre-hearing preparation, (c) claimant-Vocational Expert involvement, and (d) the Hearing Examiner-Vocational Expert relationship.

Exhibits. A major concern of the Vocational Experts was the need for psychological and vocational test data to be included in the exhibits. They felt that each claimant should have some form of psychological and vocational evaluation prior to the hearing. Hearing Examiners were less concerned as to the need as well as the value of such data.

In general, Vocational Experts felt the exhibits were not as satisfactory as they should be in determining the claimant's potential to engage in a competitive work situation. By contrast, Hearing Examiners felt that the exhibits usually were sufficient.

A major contention involved the medical data in the exhibits. Although both groups agreed as to the value of such information with Vocational Experts being significantly more concerned than the Hearing Examiners, the latter felt that the data were sufficient to determine a claimant's residual work capacities. Experts were much less sure that this was the case.

There was disagreement as to the use of the medical data in the exhibits. In many cases the medical data are frequently contradictory with conflicting reports from physicians who have examined the claimant. Vocational Experts felt that they should be able to offer opinions regarding the medical information. Thus, they were of the opinion that a resolution of the medical diagnosis could be achieved by obtaining additional medical information at their request. Hearing Examiners felt that opinions about the medical diagnosis and additional medical information were not required and were unnecessary.

Pre-hearing preparation. There were significant differences on the topic of preparation regarding pre-hearing reports. Some Vocational Experts had previously used such reports and had recommended them for use by other Vocational Experts. These reports included a summary of the data in the exhibits, an interpretation of the claimant's work capacities, if present, and some specific tentative recommendations for a job which a claimant might do. This report was then given to the Hearing Examiner prior to the hearing. Vocational Experts thought that the use of these reports was desirable, both to themselves and to the Hearing Examiner. Hearing Examiners disagreed and did not conceive of such reports being of value.

Claimant-Vocational Expert relationship. Vocational Experts responded positively to statements implying a deeper relationship on their part with the claimant, whereas Hearing Examiners did

not see the need for involvement by the expert with the claimant. Further, Vocational Experts felt strongly about the need to counsel the claimant following the hearing, feeling this service would be beneficial to the claimant. In addition, the Vocational Expert favored pre-hearing contact with the claimant. The pre-hearing contact suggested was that of an interview.

Hearing Examiners conceptualize the Vocational Expert's role as not being extremely difficult. The process of the expert's arriving at an opinion regarding the claimant's work potential, according to the Hearing Examiner, also is not difficult. Thus, Hearing Examiners conceive of the Vocational Expert's role as relatively clear cut and not necessarily complex. On the other hand, Vocational Experts regard arriving at an opinion as a complex task which is far from being simple.

Vocational Experts were less positive as to their contribution to the hearing. Hearing Examiners acknowledged that in making a disposition of the claimant's case, the Vocational Expert's testimony was of value. Vocational Experts were much less sure of the value of their testimony.

In the relationship between the Hearing Examiner and the Vocational Expert, it has been stressed that there is an implicit understanding between both as to the desirability of specific kinds of testimony which is of value in the hearing. Certain types of information help illuminate the claimant's present and past status. One area of information which both groups explicitly perceive as valuable is the personal history and to some extent, personality variables of a claimant. Vocational Experts were of the opinion that these areas were not sufficiently stressed during the hearing. In fact, they were concerned that the Hearing Examiners were not familiar with the psychological aspects of a claimant. Hearing Examiners disagreed on these issues.

The Vocational Expert perceives his role as being more than that of providing testimony regarding the work capacity and the type of work a claimant is capable of performing. This has been reflected in previous statements in which he has indicated the need to comment on medical data and involve himself more deeply with the claimant. Thus, he sees his role as being much more global. Although Hearing Examiners felt that the expert's role included more than just the determination of specific jobs, they were not as strongly convinced of the more global role as were the Vocational Experts.

A controversial area has been the desirability of personal contact between Hearing Examiners and Vocational Experts. Suggestions concerning meetings prior to or after the hearings have been made. Vocational Experts thought that a conference or

brief contact with the Hearing Examiner would be of value. Hearing Examiners did not agree to the idea of such meetings.

There were numerous areas of agreement. One was on a specific aspect of the Vocational Expert's role. Both felt that the expert should provide evidence of specific areas of work in which a claimant could feasibly function successfully. An important distinction relative to this area was between the concepts of employability and placeability. Both the Vocational Experts and Hearing Examiners were of the opinion that these were conceptually different issues. This finding suggests that both recognize that the primary obligation of the Vocational Expert is to emphasize employability. Placeability, although very important, is more difficult to demonstrate in that it requires additional information of a pragmatic nature. From the exhibits both groups felt that it was the Vocational Expert's task to assess the claimant's personal and vocational history. In developing the Vocational Expert's opinion, both groups agreed as to the use of labor market trends and the desirability of consulting with local U. S. employment offices. Both the Vocational Experts and Hearing Examiners thought that two to five job recommendations were adequate in supporting the potential work capacity for a claimant.

Although both groups were in consensus that conflicting data were usually clarified in the actual hearing, and the Vocational Expert is given sufficient latitude to present his testimony, they both acknowledged the need for a medical witness to present medical testimony regarding the claimant in question. Both Vocational Experts and Hearing Examiners noted that the former received no information regarding the outcome of the hearing. Yet both groups were opposed to formal conference or contacts following the hearing.

2. Ethical and Professional Issues

The major concern of the Hearing Examiner is that Vocational Experts have conflicting interests in the hearing process. That is to say, Hearing Examiners felt more strongly than did Vocational Experts that the latter had a more difficult time in separating their usual role as counselor or clinician from the legal role of Vocational Expert. Hearing Examiners further were of the opinion that such conflicting interests resulted in the Vocational Expert's inability to remain objective. Vocational Experts perceived their role in the hearing as more than providing testimony about a claimant's work potential. These additional duties which experts feel the need to provide may be the conflict of interest and subsequent lack of objectivity to which Hearing Examiners are refer-

ring. Both Vocational Experts and Hearing Examiners agreed that objectivity and impartiality are important in the hearing and that these are not particularly difficult to achieve. It would appear that the Vocational Expert does not think that he is being biased in any way, but rather that he is maintaining the required objectivity.

Vocational Experts were very concerned that their testimony was based upon data which were secondary in nature. They felt that their testimony presented an ethical question in that they were judging the claimant in an impersonal manner. Hearing Examiners did not see this as an important issue. On the basis of the secondary nature of the data in the exhibits, Vocational Experts emphasized the desirability of prefacing their testimony by indicating it was of a speculative nature. Again, Hearing Examiners were not concerned with the desirability of this approach. Hearing Examiners evidently assume that the testimony has a speculative quality to it because the implicit concept is that testimony is opinion, based upon specific assumptions presented by the Hearing Examiner.

To function in an ethical manner, Vocational Experts were of the opinion that it was important for them to provide recommendations to the claimant regarding the availability of rehabilitation services. This opinion is consistent with the data on the expert-claimant relationship previously discussed. The Vocational Expert expressed the desirability of counseling the claimant. Presumably, counseling would include providing recommendations for rehabilitation. Hearing Examiners responded to the desirability of rehabilitation recommendations as being unnecessary, which was also their attitude toward counseling the claimant.

3. Competencies Needed by Vocational Expert

There was a fairly uniform agreement on most of the items dealing with this topic. Both Vocational Experts and Hearing Examiners felt that the former were knowledgeable with regard to the transferability of work skills according to job family groupings. They agreed that Vocational Experts should have training in vocational theory, disability and job placement, and should have a working knowledge of job placement agencies such as the local state employment service.

Both felt that a Doctorate degree is not a necessary requirement to function as a Vocational Expert. They further agreed that the Vocational Expert's testimony was helpful to the Hearing Examiner in deciding the eligibility of a claimant to receive disability payments. Both Hearing Examiners and Vocational Experts

agreed that it was not desirable for the latter to have any special training in legal matters or procedures. Both felt that the expert's previous professional training qualified him for the role as an expert witness.

There were only two statements regarding competencies needed by Vocational Experts where disagreement existed. First, Hearing Examiners thought experts had a very limited knowledge of legal procedures. While in agreement with this, Vocational Experts did not feel as strongly as did Hearing Examiners and the difference is significant. This finding is in apparent contradiction to previous responses, which suggested that specialized legal training is not necessary for Vocational Experts. The data do not explain this contradiction. One interpretation is that Vocational Experts feel very insecure in involving themselves in another profession which on the surface perhaps appears unrelated to psychology and counseling. For the Vocational Expert to involve himself in the legal area means acquainting himself with another different vocabulary of specialized terms in order to understand legal theory. On the other hand, Hearing Examiners may be defensive as to what they may consider an intrusion by others outside of their profession. If this interpretation is valid, it could be concluded that defensive attitudes may impair effective cooperation in the disability hearing.

A final area of disagreement was in the area of experience with handicapped clients. Hearing Examiners thought that the effectiveness of a Vocational Expert was directly related to his experience with handicapped individuals. Vocational Experts were in less agreement with this statement than were Hearing Examiners and the difference is significant. Apparently Vocational Experts are of the opinion that extensive experience with handicapped clients is not a necessary requirement for them to serve in the expert witness role in disability hearings.

4. Philosophy and Attitudes Toward the Social Security Disability Program

The data suggest that Vocational Experts were more of the opinion than were Hearing Examiners that Social Security disability payments are difficult to obtain. In fact, they thought that the legal definition of disability was emphasized too much, presumably to the disadvantage of the claimant. Their attitude thus suggests that the whole concept of disability laws is too restrictive and limiting to the individual claimant. Their attitude toward the

claimant and the Social Security program in general might be considered to be liberal. Thus, they would be more inclined to interpret the laws governing Social Security disability somewhat less strictly. In contrast, Hearing Examiners could be considered to be more conservative in their orientation. They believed that the criterion for granting disability payments should be within the framework of the law and not everyone should be entitled to benefits.

Further related to the social orientation of the Vocational Experts was their perception that a claimant's disability was not isolated to the specific diagnosed disabling condition. To them, the disability was more global and involved cultural as well as emotional factors. Hearing Examiners, while agreeing that emotional aspects were of concern, were less prone to emphasize them.

A final point concerning the nature of the disability hearing expressed by Vocational Experts was the feeling that the hearing was the end product of a failure in the rehabilitation process. Thus, they were of the opinion that the hearing and their services would not be necessary if adequate rehabilitation had been provided for the claimant. Hearing Examiners disagreed with this idea and the difference of opinions between both groups was significant.

The picture which emerges is that of a polarity between a more liberal minded position as opposed to the conservative orientation. As mentioned, Hearing Examiners were oriented toward a more reserved, conservative approach in which strict interpretation of the disability provision was emphasized. Contrary to this were the Vocational Experts who perceived many complicating factors beyond the alleged disability. Thus, they were prone to emphasize the psychogenic and cultural determinants as they affect the claimant.

The implications of this study are relevant to the expert witness in general, to specific aspects of the Vocational Expert, and to the Vocational Expert program. Psychologists and counselors appear to have had too little exposure to forensic areas. To correct this it is recommended that seminars or units of study be included in graduate programs offering degrees in psychology and counseling.

The Vocational Expert's apparent lack of legal sophistication could also be remedied by providing regional seminars or conferences in which legal philosophy and procedures are taught. Such seminars would be enhanced if both Hearing Examiners and Vocational Experts participated jointly.

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Chapter VII

The Vocational Expert Program—an Overview

Edwin W. Semans

The purpose of this article will be to review in summary form the accomplishments of the Vocational Expert program administered in the BHA of the Social Security Administration, to offer some comments on the administrative and substantive problems that still remain, and to briefly speculate on the anticipated future course of the program.

During the past decade, the Vocational Expert program has grown from a fledgling experiment groping for approaches that would prove judicially and administratively acceptable into a mature, well-organized operation that has gained widespread acceptance and support not only by the judiciary but also by the various professional organizations whose members provide the expertise at the hearings. In terms of volume, there has been a marked increase in the number of hearings where a Vocational Expert has been called to testify. In fiscal year 1963, its first year of operation, Vocational Experts testified at 513 hearings in connection with claims for disability benefits under the Social Security Act. In fiscal year 1971, this figure had grown to 9,215. (See Chart No. 1.[1]). The number of requests for hearing filed in connection with disability claims also increased dramatically during this period. In fiscal year 1963, there were 14,644 requests for hearing in disability cases. In fiscal year 1971, there were 40,712 such requests. (See Chart No. 2.[1]). It is interesting to note that not only did usage of Vocational Experts increase sharply from a numerical standpoint, but these experts are now appearing in a far higher percentage of hearings on disability claims. In fiscal year 1963, Vocational Experts were utilized in only 2.9% of the disability cases where a disposition was made at the hearing level. In fiscal year 1971, Vocational Experts were utilized in 24.5% of these cases. (See Chart No. 3.[1]).

Before leaving the quantitative aspects of the Vocational Expert Program, it would seem appropriate to briefly comment on the effect of vocational testimony on the ultimate outcome of the case. Most of the writing that has been done on the use of Vocational Experts in social security hearings has been in the form of decisions issued by the federal courts. Since in practically all of the cases that are appealed to court the Hearing Examiner has issued

[1] Charts 1, 2, and 3 (pages 123, 124, 125 respectively) were extracted from the *Briefing Pamphlet for the Bureau of Hearings and Appeals*, dated June 30, 1971.

a denial decision, it might be inferred that where a Vocational Expert testifies at the hearing, the claim for disability benefits is usually denied. In fact, a contrary inference may be closer to the truth. Although complete statistical data on this particular point was not readily available, statistics covering a representative (and relatively recent) period of time indicate that the testimony of a Vocational Expert at a hearing may often provide the basis for a decision favorable to the claimant. During the period October 1, 1970 to June 30, 1971, Vocational Experts testified in 3,294 cases. In 1,501 (or 45.5%) of these cases, the Hearing Examiner issued a decision finding that the claimant was entitled to disability benefits. During this same period of time, the overall Hearing Examiner "reversal rate" [2] in disability cases was 43.8%.

In terms of the substantive direction of the Vocational Expert program, the decisions issued by the Federal courts and the 1967 Amendments to the Social Security Act have unquestionably had the greatest impact. For a number of years, there was a sharp divergence of opinion among the various federal district and circuit courts of appeals with respect to the type of vocational evidence that was needed to properly document disability claims filed under the Social Security Act. This made a uniform administration of the Act quite difficult. However, with the enactment of the 1967 Amendments, Congress clarified the statute with respect to the proper vocational criteria that was to be applied, and most courts promptly adopted a position that was in accord with this legislative directive. Although the 1967 Amendments eliminated or greatly reduced many of the problems that beset the Vocational Expert program during its formative years, there still appears to be some existing problem areas where practical and legally acceptable solutions must be found.

At a "model" hearing, the Vocational Expert has been furnished with the pertinent evidentiary exhibits containing detailed descriptions of the claimant's past work experience, education, hobbies, daily activities, etc., well in advance of the actual hearing. Utilizing the various reference books and other occupational source materials available to him, he has carefully identified and classified the claimant's work skills and has determined the extent to which these skills are transferable to other specific jobs, taking into account both the physical and mental demands of these occupations. He has also reviewed either personally conducted surveys, those made by colleagues, or other authoritative agencies or texts to identify the incidence of these jobs in the economy. At the

[2] (i.e., the hearing examiner issued a decision favorable to the claimant, thereby "reversing" the unfavorable determination at the reconsideration level.)

hearing, the Hearing Examiner through his questioning of the claimant clarifies and supplements the documentary information relating to the claimant's vocational background. After the claimant and any other witnesses have finished testifying, the Hearing Examiner qualifies the Vocational Expert as an expert witness; explains why he is there; and asks him to identify the normal physical requirements, working conditions, and occupationally significant characteristics of the claimant's previously held jobs. Next, he poses a series of hypothetical questions to the Vocational Expert asking what specific jobs the claimant can perform based upon varying levels of severity of the claimant's impairments, phrased in terms of *work related* physical and mental functions (e.g., manipulative dexterity; visual and auditory acuity; the ability to bend, lift, stand, walk, etc.). The Vocational Expert responds to each hypothetical question by naming fields of work and specific jobs (if any) the claimant can perform assuming the degree of impairment or loss of function presented in the hypothetical question. The Hearing Examiner then asks the Vocational Expert to give the geographical incidence and location of these jobs. The Vocational Expert also provides appropriate rationale explaining how he bridged the "vocational gap" between the claimant's previous work experience and the jobs specified in his testimony, and cites any pertinent resource material that he may have utilized in preparing for the hearing.

While most hearings are conducted in the foregoing manner, some are not, and very often deviations from the foregoing approach are not due to a lack of expertise on the part of either the Vocational Expert or the Hearing Examiner but are caused by incomplete evidence, administrative pressures to maintain case processing time at an acceptable level, the very nature of the hearing itself, and the tendency of some Vocational Experts to offer "medical" testimony at the hearing.

If the Vocational Expert is to adequately prepare for a hearing, it is essential that he be furnished with a detailed description of the jobs the claimant has performed in the past. If he does not have this information, he will be unable to determine the occupationally significant characteristics of these jobs, and this in turn will inhibit his ability to determine what vocational skills the claimant possesses that may be transferable to other occupations. Although the Hearing Examiner will often be able to elicit much of this information at the hearing, the Vocational Expert is in a far better position if he is furnished this data in advance of the hearing. By the same token, the Hearing Examiner can only pose proper hypothetical questions to the Vocational Expert that are phrased in terms of work related physical and mental functions if

the medical reports of record utilize this type of terminology. All too often, however, the contents of the medical reports of record are either too general or are confined to clinical and laboratory findings, diagnoses, and the prognosis. The insufficiency of the documentary evidence in both instances can be corrected but only by delaying the hearing and contacting the claimant and/or his previous employers for the relevant job information; by requesting the physicians who submitted reports to provide supplementary reports specifying the extent to which the claimant's impairments limit his ability to walk, stand, tolerate various forms of exercise, etc.; or by requesting a Medical Advisor to appear at the hearing to provide this type of interpretative medical analysis. Unfortunately, such development is often very time consuming and would not be administratively feasible if attempted on anything more than a limited scale.

In addition to the problems generated by insufficient documentation, the very nature of the hearing proceeding in a case involving a claim for disability benefits has an adverse effect on determining the claimant's ability to do other work within his residual functional capacities and prior work experience. Most of the clients that a Vocational Expert is called upon to work with and counsel are actively seeking a job and are so motivated. In most instances, a claimant coming to a hearing on a claim for disability benefits is there because he is convinced he is disabled and unable to perform any type of work; his claim has already been turned down twice; he desperately needs the benefits he is seeking; he has not worked for more than a year, and he lives in a community where even able-bodied younger men are unable to find work. With the claimant possessing this type of mental and emotional configuration, he is understandably inclined to emphasize the severity of his impairments and *loss* of function rather than his *residual* physical and mental capabilities. This is compounded by the emotional reaction of the claimant to the hearing itself. Although Hearing Examiners generally do an excellent job in making claimants feel at ease during the hearing, it is still a traumatic experience for most individuals. For the Vocational Expert to properly and realistically evaluate the claimant's ability to do other work, if any, under these conditions is, to say the least, a difficult task.

There has also been some difficulty in delineating the precise role of the Vocational Expert at the hearing. The Vocational Expert is qualified as an expert witness at the hearing only in the vocational area. However, a number of Vocational Experts are also clinical psychologists while others have had considerable experience in the field of vocational rehabilitation and in evaluating the impact of an individual's impairments on his ability to func-

tion in a job setting. As a result of this collateral experience and knowledge, some Vocational Experts occasionally offer their opinion on the severity of the claimant's impairments (particularly in the psychiatric area) and also on the extent of his disability. Inasmuch as the Vocational Expert has not been qualified as an expert medical witness and under our program only Board-certified physicians are qualified to offer such medical testimony, it is essential that the Vocational Experts fully understand their role at the hearing and that the Hearing Examiners take the necessary steps to insure that their testimony is limited to the vocational aspects of the case.

Fortunately, the foregoing problems now occur on a relatively infrequent basis and they are certainly not insoluble. However, the anticipated sharp increase in our case load will create an adjudicative environment in which some of these problems may well assume greater proportions and significance. In fiscal years 1972 and 1973, the number of requests for hearing in disability cases under Title II of the Social Security Act is expected to reach a combined total in excess of 120,000. If the ratio between case dispositions at the hearing level and utilization of Vocational Experts remains the same as in fiscal year 1971, Vocational Experts may appear in as many as 30,000 hearings during this 2-year period.

In addition to the anticipated increase in the number of hearing requests that will be filed in connection with disability claims under Title II of the Social Security Act, there are two other pieces of legislation that may have an impact on the Vocational Expert Program.

The Federal Coal Mine Health and Safety Act of 1969 provided for the payment of benefits to coal miners who were totally disabled due to pneumoconiosis contracted from work in the nation's underground coal mines. Under the provisions of this act and implementing regulations once a miner established that he had simple pneumoconiosis and that as a result thereof he had suffered a loss of pulmonary function that met or was equivalent to certain prescribed numerical values (as demonstrated by designated pulmonary function tests) the determination of whether he was under a "disability" was essentially the same as under Title II of the Social Security Act. Although by March 1972 approximately 1,000 Hearing Examiner decisions had been issued in Black Lung cases involving claims by live miners, there was little or no utilization of Vocational Experts at the hearings in these cases. This can be attributed to several factors. First, a large percentage of the claimants in these cases were more than 65 years of age and had very limited vocational potential in terms of training, work experience, and education. Second, most of the claims that were denied

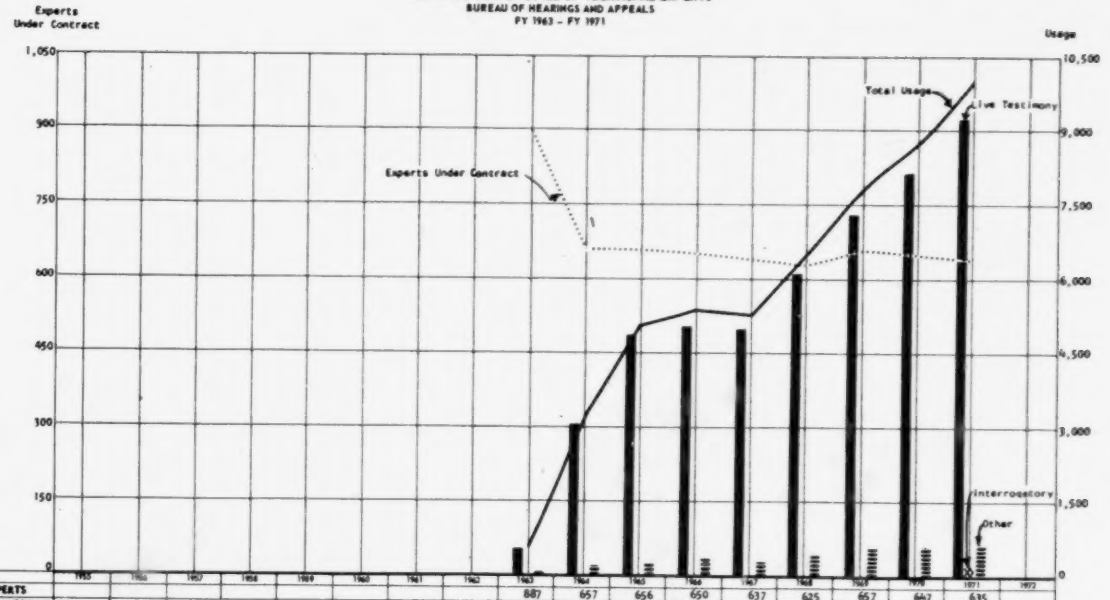
were disallowed on the basis that either the presence of pneumoconiosis had not been established or the results of the pulmonary function studies did not satisfy the aforementioned numerical criteria. Accordingly, there was no real basis for utilizing the services of a Vocational Expert in these cases. However, in May 1972, new legislation was enacted (The Black Lung Benefits Act of 1972) which will dramatically change the adjudication of these claims and possibly the degree to which vocational testimony is needed in determining entitlement.

To some extent, the same observations may be made about the welfare legislation which is now pending before Congress. It is expected that many of the disability claims filed in connection with Title XX of this legislation (Assistance for the Aged, Blind, and Disabled) will be filed by older individuals with very marginal vocational skills and work experience. Hence, in many of these cases the testimony of a Vocational Expert may not be needed. However, it should be pointed out that even if Vocational Experts are utilized in only a small percentage of the hearings on these claims, the sheer number of disability claims filed may produce a sizeable caseload at the hearing level. The effective date for that part of the legislation pertaining to disability claims has tentatively been scheduled for January 1974, and during fiscal year 1974, it is anticipated that approx mately 70,000 requests for hearing will be in connection with claims for disability benefits. In 45,000 of these cases, the primary or determinative issue will be whether the claimant is under a "disability." One can only speculate at this point as to the specific type of vocational evidence that will be required in these cases. However, it would appear that the basic substantive and procedural approach used in Title II hearings will be equally applicable in hearings held under Title XX.

In summary, it can be said that if the past ten years has presented a series of unique challenges for the Vocational Expert program, the future will certainly present challenges of even greater magnitude and complexity. However, if the Hearing Examiner corps and the Vocational Experts respond with the same dedication of purpose and commitment to excellence that they have demonstrated in the past, there is little doubt that these new challenges will be met and that the high level of service to the public and considerable accomplishments of the last decade will continue.

CHART 1

HEARING EXAMINER USAGE OF VOCATIONAL EXPERTS
BUREAU OF HEARINGS AND APPEALS
FY 1963 – FY 1971



	1955	1956	1957	1958	1959	1960	1961	1962	1963	1964	1965	1966	1967	1968	1969	1970	1971	1972
EXPERTS									887	657	656	650	637	625	657	647	635	
LIVE T'Y									513	3,019	4,867	5,045	4,987	6,094	7,252	8,142	9,215	
INTERROG'Y									--	--	--	--	--	--	--	--	167(c)	
OTHER (a)									21	190	219	339	274	433	555	580	631	
TOT USAGE (b)									534	3,209	5,086	5,384	5,261	6,467	7,807	8,722	10,013	

SOURCE: BHA:A-4

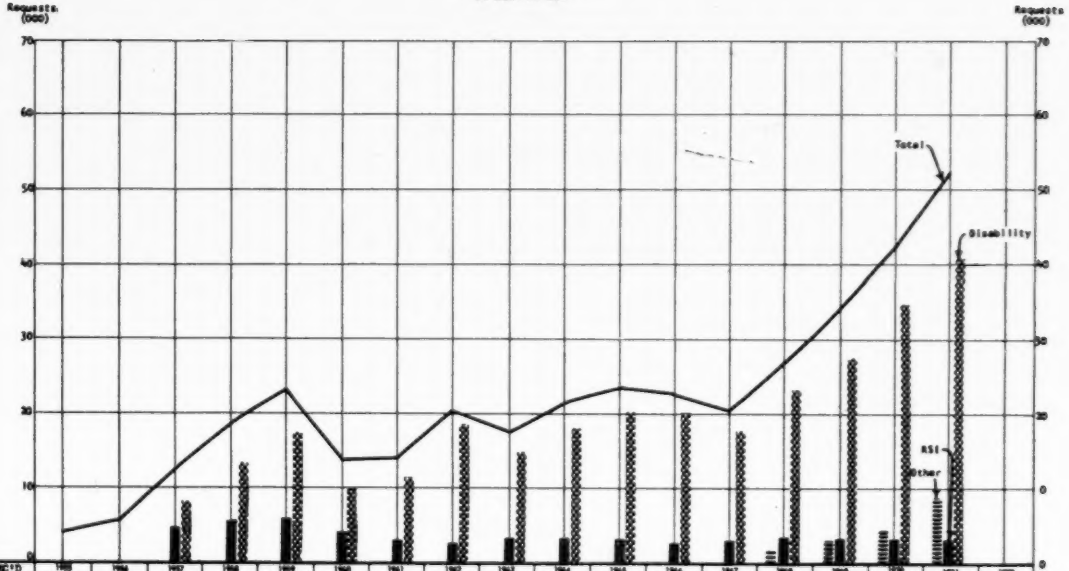
(a) Claimant did not appear at scheduled hearing, hearing was postponed for good cause, etc.

(b) For definition of "Usage", see Note 1 of analysis.

(c) Contract provided for interrogatories for first time in FY 1971.

CHART 2

HEARING REQUESTS RECEIVED DISABILITY, RSI, AND OTHER
BUREAU OF HEARINGS AND APPEALS
FY 1955 – FY 1971



REQ REC'D	1955	1956	1957	1958	1959	1960	1961	1962	1963	1964	1965	1966	1967	1968	1969	1970	1971	1972
OTHER*	---	---	---	---	---	---	---	---	---	---	---	2	111	196	1,020	4,548	8,761**	
RSI	NA	NA	4,594	5,493	5,965	3,946	2,893	2,621	2,991	3,232	3,106	2,511	2,819	3,316	3,252	3,124	2,954	
DISABILITY	NA	NA	8,006	13,218	17,382	9,832	11,168	18,756	14,644	18,123	20,217	20,101	17,812	23,234	27,972	35,381	40,712	
TOTAL	4,009	5,600	12,600	18,711	23,347	13,778	14,061	21,377	17,635	21,355	23,323	22,614	20,742	26,746	32,244	42,573	52,427**	

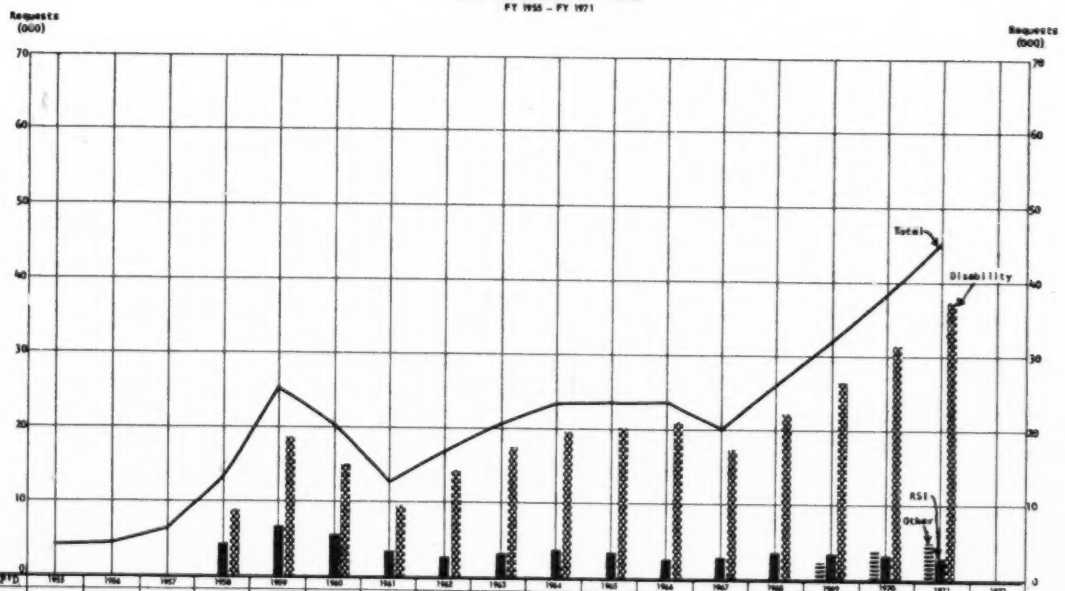
SOURCE: HA 570

NA-Not Available

*Includes KID-SKID (1966) and IMID (1969) programs ** Includes 2,326 black lung requests

CHART 3

HEARING REQUESTS DISPOSED DISABILITY, RSI, AND OTHER
BUREAU OF HEARINGS AND APPEALS
FY 1956 – FY 1971



REQ DISP'D	1955	1956	1957	1958	1959	1960	1961	1962	1963	1964	1965	1966	1967	1968	1969	1970	1971	1972
OTHER*	—	—	—	—	—	—	—	—	—	—	—	0	43	337	2,151	3,549	4,893	
RSI	NA	NA	NA	4,276	6,703	5,288	3,197	2,510	3,078	3,664	3,292	2,526	2,720	3,327	3,210	3,996	2,867	
DISABILITY	NA	NA	NA	8,962	18,556	14,974	9,591	14,454	17,671	19,698	20,101	20,908	17,318	22,275	26,551	31,511	37,541	
TOTAL	4,131	4,200	6,300	13,238	25,259	20,262	12,788	16,964	20,749	23,362	23,393	23,434	20,081	25,939	31,912	38,480	45,301	

SOURCE: HA 570

NA-Not Available

*Includes HIB-SMIB (1966) and IMIB (1969) programs

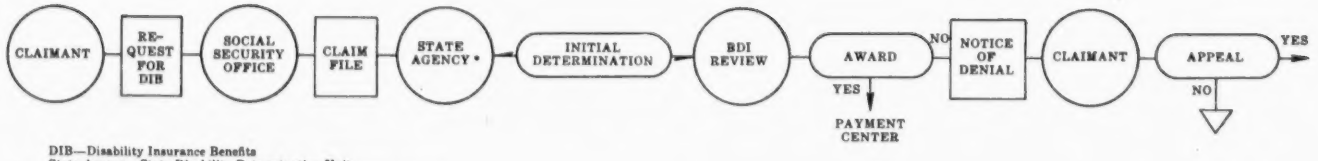
Appendix I

Summary of Adjudicative Process

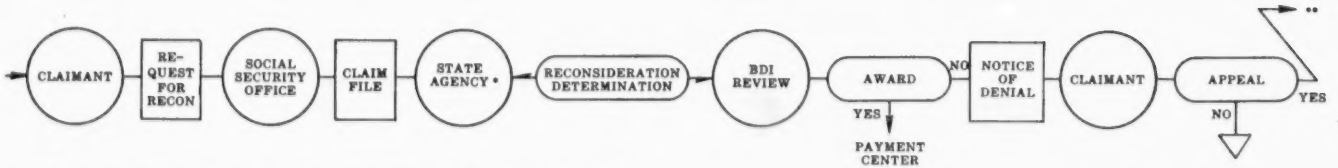
Chart I Pre-Hearing Procedure Illustrative of Title II Disability Cases
Chart II Illustrative Chart of the Appeals Process in Title II Disability Cases
Brief Description of the Appeals Process Applicable to Disability Benefits

Pre-hearing Procedure
Illustrative of Title II Disability cases

Chart I



DIB—Disability Insurance Benefits
State Agency—State Disability Determination Unit
BDI—Bureau of Disability Insurance (The Administrative Agency)
RECON—Reconsideration of the Initial Determination



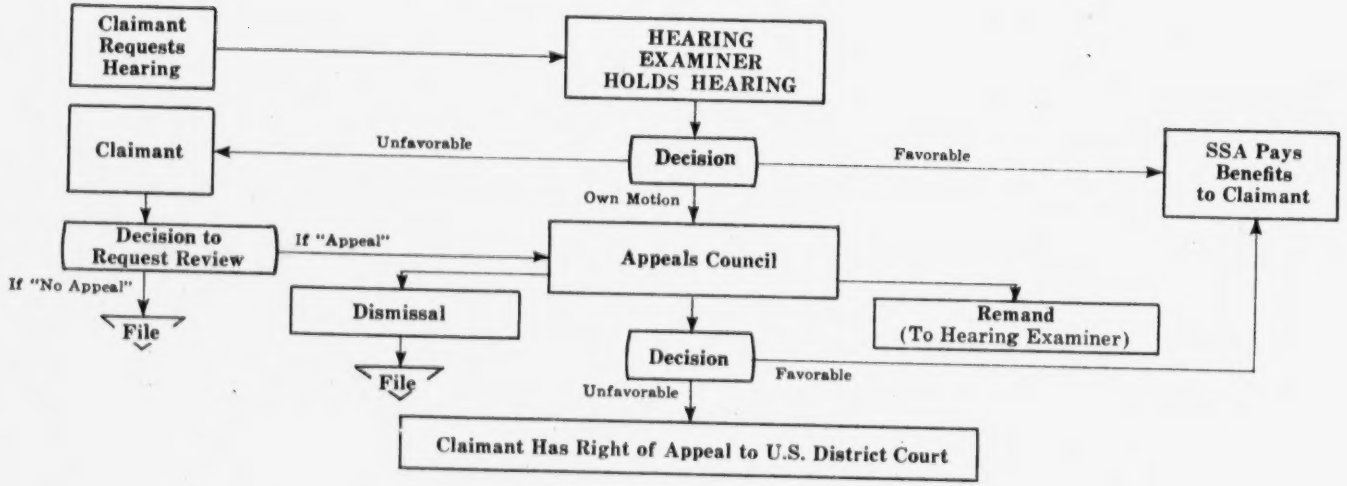
* In developing a case, the State Agency may obtain consultative medical examinations of the claimant. See Branscomb, Ben V., M.D., *Ibid*, p. 21.
** See Chart II "The Appeals Process in Title II Disability Cases," Page 129.

Illustrative Chart

The Appeals Process in Title II Disability Cases

Chart II

Bureau of Hearings and Appeals
July 1971



Basic Steps in the Appeals Process

1. Hearing examiner holds hearing upon receipt of claimant's request and makes decision.
2. Subject to Own Motion review by Appeals Council, if the hearing examiner's decision is favorable, SSA pays benefits.
3. If the hearing examiner's decision is unfavorable, a claimant has sixty days to appeal to the Appeals Council. The granting of review is not automatic.
4. The Appeals Council reviews the hearing examiner's decision upon request of claimant or on its Own Motion.
5. If the Appeals Council decision is favorable, SSA pays benefits as for Step 2.
6. If the Appeals Council decision is unfavorable, claimant has sixty days to appeal to a U.S. district court.
7. If the Appeals Council finds that the hearing examiner's decision is not proper and that additional evidence is required, it may vacate the decision and remand the case to a hearing examiner.

A Brief Description of the Appeals Process Applicable to Disability Benefits

(See Chart II, Page 129)

Hearing

A claimant who is dissatisfied with a previously reconsidered determination (see Chart I) on his claim for disability benefits may request a hearing. The Hearing Examiner schedules a hearing and, if possible, holds it near the claimant's residence. At the hearing, testimony is under oath or affirmation and recorded verbatim. The Hearing Examiner inquires fully into the issues, receives in evidence the testimony of witnesses and relevant documents, and allows the claimant or his representative to present arguments and examine witnesses. If the Hearing Examiner believes that additional evidence is necessary for a proper decision, he may request the assistance of other components of SSA or of a State agency. He frequently requests a Vocational Expert and/or a Medical Advisor (see Oates, James, R., M.D., Ibid, page 27) to testify.

The Hearing Examiner issues a decision in writing, which may affirm, reverse, or modify the previous administrative determinations. He mails a copy of the decision to the claimant and representative, if any, with notice of the right to request, within 60 days, that the Appeals Council review the Hearing Examiner's decision.

Appeals Council Review

Upon receipt of a claimant's request for review of the Hearing Examiner's decision, the Appeals Council proceeds to consider the testimony and documentary evidence of record, including any additional evidence submitted with the request for review, together with the findings and conclusions in the Hearing Examiner's decision. The Council may grant review, permit the claimant or representative to appear, if desired, undertake any needed development, and issue a decision which affirms, modifies, or reverses the Hearing Examiner's decision. The Council may also remand the case back to the Hearing Examiner or dismiss the request for review for untimely filing or for other appropriate reasons. The Appeals Council may also deny the request for review when in its opinion the Hearing Examiner's decision is correct, thereby permitting the Hearing Examiner's decision to stand as the Secretary's final decision.

The Appeals Council may also consider a case on its own motion when the Hearing Examiner's decision does not appear to be in

accord with the law and regulations, undertake any necessary development, and then issue a decision affirming, modifying, or reversing the Hearing Examiner's decision. In the alternative, the Appeals Council may remand the case to a Hearing Examiner for rehearing and issuance of a new decision.

Accompanying an Appeals Council decision or denial of review in Title II claims is a notice to the claimant of the right to obtain further review by commencing a civil action within 60 days in a district court of the United States.

When the claimant files a civil action in the Federal district court, within 60 days or such additional time as may be granted by the Appeals Council upon showing of good cause, the court reviews the case based on the certified record and is precluded from considering any evidence except that which is contained in the record compiled during the administrative proceedings. The finding of the Secretary as to any fact, if supported by substantial evidence, is conclusive on the court. However, the court may remand the case to the Secretary for further hearing or the taking of additional evidence. Also, upon the Secretary's request before answer is filed, the court shall remand the case for his further action. Upon remand, after hearing if required, a decision is filed with the court modifying or affirming the prior decision.

If dissatisfied with the decision of the U. S. District Court, the claimant has a right to appeal his case to a U. S. Court of Appeals (there are 11 circuits) and, if dissatisfied with this court's decision, may take a further appeal to the Supreme Court of the United States. The Secretary has a similar right.

Appendix II

Medical Advisor Contract

TECHNICAL AND/OR PROFESSIONAL SERVICE CONTRACT

APPROPRIATION	ALLOTMENT		CONTRACT NO
75030409-(BL) 7538704	4001	.2549 (Item 3) .2542 (Item 1&2)	SSA-73

1. The Department of Health, Education, and Welfare, **SOCIAL SECURITY ADMINISTRATION** hereby contracts for the services of _____ hereinafter referred to as the contractor, subject to the conditions on the reverse.

Nature of Services to be rendered by the contractor is as follows: *(Specify all services to be rendered and equipment and supplies furnished)*

1. As requested, (a) to examine, study and evaluate medical reports; to answer in writing specific questions on medical issues involved under the Federal Coal Mine Health and Safety Act, Title IV; and Social Security Act, Title II, disability hearing cases pending before the Bureau of Hearings and Appeals, comments to become a part of the official record in the case-$50 per case; (b) to answer in writing further interrogatories on (a) above arising out of the hearing process-$50 per submission; (c) for study, evaluation and written comment on additional medical evidence in a case for which a fee was previously charged-$25.
2. As requested, (a) to appear as an expert witness at scheduled hearings in cases upon which he has previously commented in writing-$75 per appearance on any day or fraction of a day in any one case whether or not contractor actually testifies; (b) to appear as an expert witness at scheduled hearings in cases upon which he has not previously commented in writing-$75 per appearance on any day or fraction of a day in any one case whether or not contractor actually testifies; plus an additional $50 per case for a prehearing study and evaluation of the medical evidence unless the contractor does not appear at the scheduled hearing.
3. As requested, (a) to participate in group discussions with hearing examiners involving various questions as to the nature, extent, and severity of various types of impairments-$50 per session; plus an additional $50 fee if a lecture requiring special preparation is delivered in connection with the foregoing; (b) for attendance, for not more than one day at any one time, at a general Title IV, discussion with representatives of the Bureau of Hearings and Appeals, $75.

The above services will be rendered in → CITY: Location to be determined by the Hearing Examiner. STATE:

2. Period of Contract — FROM: _____ TO: 6/30/73

3. Fee: See each item above — ☐ Includes travel ☒ Plus travel in accord. with Std. Govt. Tr. Reg.

4. Qualifications

a. Physicians and Dentists – The contractor certifies that he was graduated from a duly accredited school of _____ in the year _____ and is licensed to practice in the State of _____

b. Other Professions – The contractor certifies that he is professionally or technically qualified as indicated in the following brief statement of training and experience:

5. Contractors Agreement. The undersigned hereby agrees to provide the services stated above in accordance with all terms and conditions of this contract.

CONTRACTOR'S SIGNATURE	SOCIAL SECURITY NUMBER	DATE
MAILING ADDRESS (Number and street)	CITY AND STATE	ZIP CODE

6. Recommended (Operating Unit)

SIGNATURE	TITLE	DATE
	Chief Medical Officer Medical Advisory Staff	

7. Accepted by the Government

SIGNATURE	TITLE	DATE
	Director, BHA	

FORM SSA-2113 (7-70)

(See conditions on reverse)

Appendix III

Recruitment of Vocational Experts

Criteria for Selection
Vocational Expert Contract
Where to Apply

Criteria for Selection

A. Recent experience in:
   1. rehabilitation counseling and/or placement, particularly with clients having prior work experience.
   2. the use of occupational materials developed for vocational counseling, including information about the requirements of jobs such as duties, skills, physical demands, working conditions and occupationally significant characteristics. A working knowledge of the Dictionary of Occupational Titles, Third Edition, 1965, and its two supplements is important.
   3. the utilization of the concept of transferability of skills in terms of worker traits and functions.

B. Ability to observe and evaluate personal characteristics, educational and vocational background.

C. Well rounded, up-to-date knowledge of, and experience with, industrial and occupational trends and local labor market conditions.

Persons having employer-employee relationship with the Federal government (full-time, part-time or WAE) may not be offered contracts in this program.

Certain employees in government agencies other than Federal may also be precluded from participation where, for example, the individual utilizes space, material, or equipment provided by the Federal government; where his salary is paid from funds matched by Federal funds; or where he is under the supervision or control of a Federal officer.

TECHNICAL AND/OR PROFESSIONAL SERVICE CONTRACT	APPROPRIATION	ALLOTMENT	CONTRACT NO.
	75030409-(B1) 7538704	.2543 (Item 1&2abc) 4001 .2549 (Item 3&4) .2364 (Item 2d)	SSA-73

1. The Department of Health, Education, and Welfare, **SOCIAL SECURITY ADMINISTRATION** hereby contracts for the services of _____ hereinafter referred to as the contractor, subject to the conditions on the reverse.

Nature of Services to be rendered by the contractor is as follows: *(Specify all services to be rendered and equipment and supplies (un)ished)*

1. As requested, for appearance in cases before the Bureau of Hearings and Appeals as an expert witness in Title IV, Federal Coal Mine Health and Safety Act; and Title II, disability Social Security Act hearings in order to testify as to his opinion of whether or not a claimant can work, and if so, what classes of work he can do and what jobs he can perform in the light of his background and impairment. $50 for the first appearance, and $25 for each additional appearance in the same day, whether or not contractor testified.
2. For examination and study of the official record of (a) a remanded case, $50 per case (b) other than remanded cases, $35 per case; (c) for study, evaluation, and written comment on additional medical evidence in a case for which a fee was previously charged-$25; (d) reasonable cost for long distance telephone calls for purpose of verifying pertinent vocational information contained in a survey report of businesses and industries, such survey reports having been prepared by other than the contractor, provided that the fee and cost of long distance telephone call will not be payable if the contractor fails to appear when requested, at the scheduled hearing on the case.
3. As requested and authorized by the Bureau, for a survey of businesses and industries in a designated area for the purpose of developing pertinent vocational information, including the functional requirements of each job, (a) for planning the survey and scheduling visitation $25 per survey; (b) for actual plant visitations and data collections $75 per day, as authorized; (c) for compilation of data and preparation of a final report-$75 per survey, provided that no fee shall be payable until the final report is received and accepted by the Bureau.
4. For attendance as requested, for not more than one day at any one time, at a general Title II, Disability, and/or Title IV discussion with representatives of the Bureau of Hearings and Appeals, $50.

The above services will be rendered in →	CITY	STATE
	Location to be determined by the Hearing Examiner	

2. Period of Contract FROM	TO	3. Fee	
	6/30/73	See each item above	☐ Includes travel ☒ Plus travel in accord. with Std. Govt. Tr. Reg.

4. Qualifications

a. Physicians and Dentists – The contractor certifies that he was graduated from a duly accredited school of _____ in the year _____ and is licensed to practice in the State of _____

b. Other Professions – The contractor certifies that he is professionally or technically qualified as indicated in the following brief statement of training and experience:

5. Contractors Agreement. The undersigned hereby agrees to provide the services stated above in accordance with all terms and conditions of this contract.

CONTRACTOR'S SIGNATURE	SOCIAL SECURITY NUMBER	DATE
MAILING ADDRESS (Number and street)	CITY AND STATE	ZIP CODE

6. Recommended (Operating Unit) SIGNATURE	TITLE Assistant Bureau Director Program Operations	DATE
7. Accepted by the Government SIGNATURE	TITLE Director, BHA	DATE

FORM SSA-2113 (7-70) (See conditions on reverse)

Where to Apply

Application forms may be obtained from:
Vocational Consultant Program Administrator
Bureau of Hearings and Appeals, SSA
P.O. Box 2518
Washington, D.C. 20013

U. S. Department of Health, Education, and Welfare
Social Security Administration
Bureau of Hearings and Appeals
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